United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,506

244

BALLARD G. HENSLEY,
Appellant,

v.

WALTER N. TOBRINER, *ET AL.*,
Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the District of Columbia Board of Commissioners' acted arbitrarily and/or capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board of the District of Columbia, (by a 3-2 split vote), ordering the retirement of a D. C. Fireman, for disability not incurred or aggravated in line of duty, under D. C. Code Title 4-526, when the evidence and the law required a finding by the Commissioners that he had become disabled due to a heart condition contracted in/or aggravated by the performance of duty, requiring retirement under D. C. Code Title 4-527.

II. Whether in a Retirement Board hearing resulting in a fireman's retirement for disability not incurred or aggravated in line of duty, the Fire Department sustained its burden of proving that a fireman's disability was <u>not</u> incurred in/or aggravated by duty, and whether the <u>doubts</u>, (if any) were improperly resolved <u>against</u> the fireman in said hearing, where the Fire Department physicians indicated that the fireman's disability was attributable to duty.

III. Whether the granting of excess sick leave and payment for "outside" medical services by the D. C. Board of Commissioners (for the same condition for which they retired appellant for disability not incurred or aggravated in line of duty) which would be illegal unless his condition was related to performance of duty, was recognition that appellant's disability was incurred or aggravated <u>in</u> line of duty.

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In the

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia denying appellant's motion for summary judgment and granting appellees' cross-motion for summary judgment entered November 2, 1967 (JA 16). This appeal was filed November 9, 1967 (JA 17).

This Court has jurisdiction by virtue of 28 U.S.C. Sections 1292, 1294 and 2106 to review the judgment of the Court below.

The complaint filed in the Court below was for a Mandatory Injunction Directing Retirement of a Fireman for Disability Incurred While Performing Duty and Directing Reversal of the Order Retiring Fireman for Disability Not Incurred in Performance of Duty (JA 1), alleging in substance that the Commissioners of the District of Columbia acted arbitrarily and capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board in ordering the retirement of appellant, a member of the District of Columbia Fire Department for disability not incurred in the line of duty. Jurisdiction in the Court below is based on Title II, Section 306 of the D. C. Code, 1951 Edition.

STATEMENT OF THE CASE

(Appellant Appointed and Suffered Chest Pains While Shoveling Snow:) Appellant, Ballard G. Hensley, was born July 21, 1912, and was appointed a member of the District of Columbia Fire Department on October 24, 1945, at which time he was found to be fully qualified for such appointment (JA 19).

He served as a member of the Fire Department for a period of approximately 17 years, until the date of his involuntary retirement for disability not incurred or aggravated in the line of duty, here claimed to be erroneous, on and after August 1, 1962.

On February 9, 1961, while shoveling snow on duty in front of the firehouse, Appellant suffered severe chest pains believed to be a heart attack. (JA 20, 21)

(Outside Medical Care and Excess Sick Leave) — As a result of the aforementioned chest pain attack, appellant was admitted to Casualty Hospital from February 9, 1961, until February 20, 1961. He was

also seen by several "outside" medical specialists such as Dr. Bernard J. Walsh, Dr. Frank J. Talbot and Dr. Jack P. Segal. The bills of the aforesaid doctors and hospitals were paid by the District of Columbia Government as being occasioned by an illness or injury contracted or incurred in the actual discharge of duty. (JA 22-29)

As a result of appellant's illness aforesaid, he was allowed eighty-four (84) days sick leave, from February 9, 1961, until August 31, 1961, or fifty-four (54) days in excess of the thirty (30) days normally permitted for one year. (JA30-32) This excess sick leave was approved by the appellees as being incurred in the line of duty.

(Appellant Treated At Clinic, Ordered Before Surgeons, Recommended for Retirement) — After being under the care of the Board of Police and Fire Surgeons for a long period of time as a result of his illness, appellant was directed to appear before the Board of Police and Fire Surgeons on August 1, 1961, for a physical examination in connection with disability retirement (JA 33). On July 31, 1961, Victor H. Esch, M.D., a member of the Board of Police and Fire Surgeons, reported to said Board, summarizing the recent medical history of the appellant, setting forth a number of diagnoses, including pain, anterior chest wall, left angina, cause undetermined, and recommending that he appear before the Retirement and Relief Board for consideration of retirement (JA 35-36). In a Medical Survey Report of August 1, 1961, the Board of Police and Fire Surgeons recommended appellant for consideration for disability retirement, stating in part as a basis for said recommendation, "Heart - Angine". (JA 34)

(First Retirement Board Hearing, Appeal, Restoration to Duty) — As a result of an order to do so (JA 37) on August 10, 1961, the appellant involuntarily appeared before the Police and Firemen's Retirement

and Relief Board. (JA 38-51) After the hearing, the Board voted that appellant should be retired for disability not incurred in the line of duty.

On December 28, 1961, the matter was appealed to the appellee Commissioners, who found that appellant was not disabled and should not have been retired. They rescinded the retirement order and directed appellant be restored to limited non-violent duty (JA 52-53).

(Appellant Suffered Another Attack, Again Recommended for Retirement) — After being restored to limited non-violent duty, appellant was routinely directed to appear before the Board of Police and Fire Surgeons on March 27, 1962, for a physical examination for record purposes (JA 54). In a Medical Survey Report of that date the Board of Police and Fire Surgeons recommended appellant for consideration for disability retirement (JA 55). Dr. John A. Reed, Chairman of the Board of Surgeons was apparently so concerned with the fact that the Fire Department authorities were considering assigning Hensley back to duty, and that the Surgeon's previous recommendations had not been accepted, that on March 30, 1962 he wrote to the Fire Chief in part as follows (JA 56):

> ". . . . I would like it to be on the record at this time, however, that in the event he is assigned to the Police and Fire Clinic our board of doctors will assume no responsibility for anything medical happening to him in the future. We will of necessity have to be guided by the previous recommendations of this Board and suggest that the responsibility of anything happening to this man in the future when assigned to duty must be strictly an administrative problem".

On April 5, 1962, Dr. Reed, submitted a report in which it is recommended that appellant be again referred to the Retirement and Relief Board for further consideration (JA 57).

(Additional Excess Sick Leave) — Thereafter, on April 20, 1962, while performing the routine office work to which he had been assigned, appellant suffered another attack of chest pains and then fainted. He was immediately taken to the Washington Hospital Center and admitted from April 20, 1962, until April 27, 1962 (JA 58-61). In a Medical Survey Report of May 22, 1962, the Board of Police and Fire Surgeons again recommended appellant for consideration for disability retirement (JA 62).

As a result of appellant's illness following his return to limited non-violent duty, he was allowed five hundred eighty-four (584) hours of sick leave, from April 1962 through July 1962, three hundred fourty-four (344) of which were in excess of his authorized amount (JA 63, 122). At least one hundred sixty-eight (168) hours of this excess sick leave was approved by the appellees as being incurred in the line of duty.

(Second Retirement Board Hearing) — On June 14, 1962, appellant again involuntarily appeared before the Police and Firemen's Retirement and Relief Board. During this hearing, Private Hensley testified that upon being returned to work, he was assigned to filing papers and records. He stated that he had a few pains from time to time during the first few weeks. During the third week, while involved in filing in the files, which are four-drawers high; he felt pain and seemed to feel weak and then fainted. He was thereafter taken to the hospital JA 75).

Captain John P. Breen of the D. C. Fire Department testified in substance at the hearing (JA 96) that he has known Private Hensley since 1948, and Hensley served under him since January 1959; that he was at the station house when Hensley became disabled; that during the winter of 1960-61, there had been considerable accumulations of snow and ice and one of the duties that is required of the Fire Department is

to keep driveways and sidewalks and streets adjacent to the station house, clear of snow and ice; that prior to appellant's first attack of chest pains on February 9, 1961, there had been a heavy snow and four men under Captain Breen were assigned to clearing the snow. Private Hensley had eaten lunch a little earlier than the rest of the men, so that when the other men went to eat, Hensley went out by himself and worked for at least an hour shoveling snow alone. When the Captain and the other men were about to leave the engine house to clear fire hydrants of snow, he called Hensley in and noticed that he was not looking well; that Hensley stated that he felt a little tired from the exertion "out front"; that he advised Hensley that if he continued to feel badly, to notify him through the dispatcher; that about forty-five minutes later he was called and upon returing to the engine house, he found that Hensley was lying over the desk; that he was conscious but he was not feeling very good, the color of his face being a blue-gray complexion; that the Fire Clinic was called, and Hensley was ordered to Casualty Hospital as soon as possible; that Hensley had shoveled snow off and on all during the shift and that when he saw him he appeared to be definitely sick; that he would consider Hensley to be "among the top firemen"; that he could do the work of two men and did it on many occasions when they were in a pinch (JA 98). He went into detail in support of this statement.

Part of the report of Dr. Jack P. Segal, who had also examined appellant was read, in which Dr. Segal stated: "I feel that Mr. Ballard Hensley probably does have mild coronary disease, but that most of his chest discomfort is musculskeletal in origin. He appears to be quite anxious and apprehensive and psychosomatic factors probably precipitate much of his chest pains". (JA 68)

After reviewing the testimony at this hearing, the Retirement Board adjourned the hearing and requested the Board of Police and Fire Surgeons to make a psychiatric study of Officer Hensley.

(Third Retirement Board Hearing Split 3-2 Vote, Commissioners Affirm) — On July 24, 1962, Hensley's case was again before the same Retirement Board which had considered his case on June 14, 1962. (JA 113-120) At this hearing, Dr. William H. Yeager, Jr., of the Board of Police and Fire Surgeons, appeared and testified as to Private Hensley's condition. From his testimony, it was stated "that this patient has coronary artery disease manifested mainly by angina". (JA 115) The doctor further testified as follows: (JA 117)

> "Q. Then the angina was caused by the shoveling of the snow?
>
> "A. The chest pain could have been caused by the shoveling of the snow.
>
> "Q. Would you say it was probably caused by the shoveling of the snow if he was all right before he started shoveling snow?
>
> "A. If he was all right before he started shoveling snow and shoveling snow brought on the pain, then I would say the shoveling of the snow was the cause of the angina. (Emphasis supplied)
>
> "Q. Now, as far as can be demonstrated from any examination or test that has been made, the only thing definite that can be demonstrated is that he has angina?
>
> "A. That is correct.
>
> "Q. Once angina is set off — I don't know how you describe it in medicine — but once there is an onset of angina, it is unusual for that to continue? (JA 118)
>
> "A. Sometimes it will continue, sometimes it will get worse, and sometimes it will improve.

"Q. But it can continue?

"A. It can continue.

"By Mr. Umstead:

"Q. Doctor, in line with what you just said, if I understand you correctly, you indicated that a coronary insufficiency would have preceded the onset of the angina. Isn't that correct, from what you said?

"A. Well, coronary insufficiency is not enough blood getting into the heart. If this man does a lot of exertion, he will have insufficiency which would bring on pain. The exertion can bring it on or the aging process. As we get older, our arteries get smaller.

"By Mr. Margolius:

"Q. May I ask another question following up the last question and answer? The only way that you know a person has coronary insufficiency is to determine or see some symptom of it? Is that right?

"A. Well, you can have a cardiogram.

"Q. Electrocardiogram, yes, but assuming that's normal, your diagnosis has to go back to the symptoms?

"A. That is correct.

"Q. And there is nothing in this man's record, is there Doctor, to indicate that he did have coronary insufficiency prior to his incident in shoveling the snow? (Emphasis supplied)

"A. As far as I know, there is not." (Emphasis supplied)

After the hearing, the Board, by a three-two split, voted that Officer Hensley should be retired for disability not incurred in the line of duty, the Fire Marshall, Fire Department of the District of Columbia,

and the Deputy Chief, Metropolitan Police Department, members of the Board, dissenting on the basis that they felt the retirement should be for disability incurred in the performance of duty (JA 121).

Thereafter, the matter was appealed to the Appellee Commissioners, who affirmed on August 6, 1963, subsequent to the October, 1962 amendment to Title 4-527.

(Suit Filed, Appellee's Motion for Summary Judgment Granted, and Appeal Noted) — Thereafter, appellant filed suit against the Board of Commissioners seeking in effect a mandatory injunction requiring appellees to set aside their action sustaining the Retirement Board, etc., (JA 1). Thereafter, each side filed its motion for summary judgment accompanied by pertinent exhibits. On November 2, 1967, Judge John J. Sirica's order granting appellees' motion for summary judgment and denying appellant's motion for summary judgment was filed. Thereafter, appellant filed his notice of appeal on November 9, 1967 (JA 17).

STATUTES AND REGULATIONS

1. The pertinent provisions of the District of Columbia Code, 1961 Edition, namely, Sections 4-525, 4-526 and 4-527, as set forth below:

> **§ 4-525. Medical and hospital service—Payment of by District on certificate of Commissioners.**
>
> Whenever any member shall become temporarily disabled by injury received or disease contracted in the performance of duty, to such an extent as to require medical or surgical services, other than such as can be rendered by the Commissioners, or to require hospital treatment, the expense of such medical or surgical services, or hospital treatment, shall be paid by the District of Columbia; but no such expense shall be paid except upon a certificate of the Commissioners setting forth the necessity for

such services or treatment and the nature of the injury or disease which rendered the same necessary. (Sept. 1, 1916, ch. 433, § 12(e), as added Aug. 21, 1957, 71 Stat. 394, Pub. L. 85–157, § 3.)

CODIFICATION

Section is comprised of subsec. (e) of section 12 of act Sept. 1, 1916. Remainder of section 12 of act Sept. 1, 1916 is classified to sections 4–521 to 4–524 and 4–526 to 4–535.

EFFECTIVE DATE

Section effective on Oct. 1, 1956, see note under section 4–521.

§ 4–526. Retirement for disability not incurred in performance of duty.

Whenever any member coming under sections 4–521 to 4–535 completes five years of police or fire service and is found by the Commissioners to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at time of retirement: *Provided further*, That the annuity of a member retiring under this section shall be at least 40 per centum of his basic salary at time of retirement. (Sept. 1, 1916, ch. 433, § 12(f), as added Aug. 21, 1957, 71 Stat. 394, Pub. L. 85–157, § 3.)

§ 4–527. Retirement for disability while performing or not performing duty.

(1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 percentum of his basic salary at the time of retirement, nor shall it be less than 66⅔ per centum of his basic salary at the time of retirement.

(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66⅔ per centum of his basic salary at the time of retirement. (Sept. 1, 1916, ch. 433, § 12(g), as added Aug. 21, 1957, 71 Stat. 394, Pub. L. 85–157, § 3; Oct. 23, 1962, 76 Stat. 1133, Pub. L. 87–857, § 1.)

AMENDMENT

Act Oct. 23, 1962, amended section by designating first paragraph as (1) and by adding paragraph (2).

2. Article XI, Part A, Section 1, of the Fire Department Rules and Regulations for Government of the Fire Department promulgated by the Commissioners provides:

> "That thirty days (360 hours) shall be the term of total sick leave in any year without disallowance of pay, and leave of absence with pay of members of the Fire Department of the District of Columbia may be extended in cases of illness or injury incurred in line of duty, upon recommendation of the Board of Surgeons approved by the Commissioners of the District of Columbia, for such period exceeding 30 days (360 hours) in any calendar year as in the judgment of the Commissioners may be necessary."

STATEMENT OF POINTS

I. Appellees' Action in Granting Appellant Excessive Sick Leave was an Acknowledgment That Appellant's Condition was Contracted in Line of Duty.

II. The Retirement Board and Appellees Ignored the Evidence and Improperly Retired Appellant for Disability Not Incurred in Line of Duty Rather Than for Disability Incurred in Line of Duty.

III. Under the Case of Blohm v. Tobriner, the Appellees Have the Burden of Establishing That Appellant's Disability (which it is agreed exists) Did Not Result From Performance of Duty, (or aggravation by duty) Which They Have Failed To Do.

SUMMARY OF ARGUMENT

Officer Hensley served as a fireman for approximately 17 years and was described a superior officer as being "among the top firemen". He was originally stricken with severe chest pains while shoveling snow at the firehouse, after which he was hospitalized and given "outside" medical care, the expenses for both of which were paid for from public funds which would be improper unless his condition was related to duty.

Thereafter, he was under the care of the Police and Fire Surgeons for a long period of time, during which he received excessive sick leave for his chest condition, and was recommended for disability retirement for "Heart-Angina".

Thereafter, the Retirement Board recommended his retirement for disability not incurred in line of duty but appellees ordered him restored to limited non-violent duty. Shortly thereafter, he suffered another attack, received 344 bonus excess sick leave hours approved by appellees which was improper unless related to duty, and was again ordered before the Surgeons who again recommended retirement.

He was ordered before the retirement board two more times, which the board finally, after hearing the Board of Surgeons' physician attribute the officer's Angina condition to shoveling of snow, and indicating that there was nothing in his record to indicate a coronary insufficiency prior to the shoveling incident valid 3-2 to retire him for disability not incurred in line of duty.

Appellant contends that as a result of appellees granting him excess sick leave and paying for his "outside medical expense, and the testimony of appellees Board physicians and the split 3-2 vote by the Retirement Board all indicate that appellees have failed to meet their burden to prove his disability was not incurred or aggravated by duty as required by the Blohm case, and he should be ordered retired for disability incurred or aggravated by duty.

ARGUMENT

I

APPELLEES' ACTION IN GRANTING APPELLANT EXCESSIVE SICK LEAVE WAS AN ACKNOWLEDGMENT THAT APPELLANT'S CONDITION WAS CONTRACTED IN LINE OF DUTY.

As shown in Exhibits F and M-1 (JA 30, 63) Officer Hensley was allowed sick leave both in 1961 and 1962, for "Chest Pain and Organic Heart Disease", in excess of the amount permitted under Article XI, Part A, Section 1 of the Fire Department Rules and Regulations, hereinbefore quoted, which was approved by the Chairman of the Board of Surgeons, the Fire Chief, and the Commissioners sitting as a Board. This would be improper in the absence of a finding that the said chest pain and organic heart disease had been incurred in line of duty.

It is submitted that the foregoing was a definite acknowledgment that this officer's condition resulted from or was aggravated by performance of duty, and such action is entirely inconsistent with the Retirement Board's decision finding that his condition was not incurred in line of duty.

This Court in the case of Hyde v. Tobriner, 329 F. 2d 879, 117 U.S. App. D.C. 311 (1964), recognized the significance of granting additional sick leave under these circumstances, stating, in part, at page 312 as follows:

> "With the approval of the Commissioners, appellant during his tenure, had been given about 150 extra sick leave days with pay, when suffering from arthritis on the basis of the Board's opinion that the disease 'was a direct consequence of injury received (or disease contracted) in actual performance of duty.'"

In the case of Graham v. Tobriner, in this Court, C. A. 1291-62, Judge Tamm, in commenting on this phase of the case, stated in his Memorandum Opinion, dated June 28, 1962, in part, as follows:

> "In addition to the medical testimony, the records of the Police Department and the Police Department Clinic disclose that Plaintiff's ailment was consistently recognized as having been incurred in the line of duty."

In the case of Carroll v. Tobriner, 253 F. Supp. 87 (1966), Judge Gasch, stated in part:

> "The Court's evaluation of the record is in line with the previous administrative decision to grant Plaintiff sick leave in addition to the usual annual allowance which required a finding that illness or injury, because of which the leave was granted, was related to the line of duty."

The effect of excess sick leave and similar benefits was also recognized in the Blohm case (which reversed a District Court decision), where it stated in part:

> " . . . He was given, accordingly, several days of excess sick leave and his medical bills were paid from public funds — benefits which, in the one case, under statute and, in the other, under police regulations, were available only in the case of service connected disabilities." (Emphasis supplied)

II

THE RETIREMENT BOARD AND APPELLEES IGNORED THE EVIDENCE AND IMPROPERLY RETIRED APPELLANT FOR DISABILITY NOT INCURRED IN LINE OF DUTY RATHER THAN FOR DISABILITY INCURRED IN LINE OF DUTY.

Retirement of members of the District of Columbia Fire Department is provided for in Title 4, D.C. Code (1951) Ed., Secs, 4-521-535 cited as the "Policemen and Firemen's Retirement and Disability Act."

The order complained of was issued under Title 4-526, "Retirement for Disability Not Incurred in the Performance of Duty." This section required a finding by the Commissioners, appellees, herein, that the member has become disabled due to injury received or disease contracted other than in performance of duty. The retirement under this section provided for an annuity computed at the rate of 2% of the officer's basic salary at the time of his retirement for each year or portion thereof of his service with a minimum of 40%, which amount is subject to Federal and State income tax.

Appellant contends that he should have been retired under Title 4-527, which provides for retirement for disability incurred while performing duty. This section, in substance, provides that when a member is injured or contracts a disease in performance of duty and such injury or disease permanently disables him for the performance of duty, he shall receive an annuity of not less than 66-2/3% of his basic salary at the time of his retirement (which is not subject to Federal or State income tax).

It is undisputed that Officer Hensley has been permanently disabled for the performance of his duty, for otherwise he would not have been

retired at all. The only question involved is whether the disability arose in line of duty or otherwise.

It is well established that a trier of facts by a Judge, jury, or, as in this case, a Retirement Board and appellees, etc., cannot disregard testimony which is all one way, not immaterial, etc. Thus, the Court in the case of Stone v. Stone, 78 U.S. App. D.C. 5, 8 F.2d 761, stated in part:

> "In this case there was positive testimony, uncontradicted and not inherently improbable. Neither a Jury, nor a Judge is at liberty to disregard such evidence. Where the testimony is all one way, and is not immaterial, irrelevant, inconsistent, contradicted or discredited, such testimony cannot be disregarded or ignored by Judge or Jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen."

It is also well established that while appellees have "administrative authority", they cannot act arbitrarily; and their actions in retirement matters are subject to judicial review. See Spencer v. Bullock, 94 U.S. App. D.C. 388, 216 F.2d 54, where Judge Fahy in his dissenting opinion stated at page 392, "The Commissioners may not be arbitrary, however, and their action is subject to appropriate judicial review." (Emphasis supplied)

In the case of Crawford v. McLaughlin, et al., 109 U.S. App. D.C. 264, 286 F.2d 821, a retirement case, the Court discussed the "humane purpose of such retirement laws" and stated in pertinent part:

> "We find no evidence that the disabling condition grew out of any injury received or disease contracted other than in the performance of duty. In the face of the evidence to which we have referred, tracing the condition to an injury received in the performance of duty, it would be too speculative to infer that the condition which had manifested itself prior to the carpentry and other work was due to that work." (Emphasis supplied)
>
> "Since the evidence supports only a conclusion attributing the disability to injury received in the performance of duty, Plaintiff is entitled to be retired under Section 4-527. The writ sought should accordingly be issued. We are fortified in this conclusion by consideration of the humane purpose of such retirement laws. See Bradley v. City of Los Angeles, 55 Cal. App. 2d 592, 131 P. 2d 391 (1942). This purpose would partially fail of accomplishment were the evidence in this record held to be insufficient to support retirement under Section 4-527."

On the degree of medical certainty required as to the causal connection, see the FELA case of Sentilles v. Inter-Carribean Shipping Corp., 80 S. Ct. 173, 4 L. Ed 2d 142 (1959), reversing 256 F.2d 156 (5th Cir. (Fla.) 1958), wherein it was held that medical testimony that a trauma "might or could have aggravated tuberculosis" was sufficient proof of medical causation. (Emphasis supplied)

Thus, even if appellant had the burden of connecting his disability with his duties as a fireman, which is not the law, as hereinafter shown, submitted that he has successfully borne such burden; and he should, under the "humane purpose of such retirement laws," be retired for disability incurred in line of duty with its attendant advantages.

III

UNDER THE CASE OF BLOHM V. TOBRINER, THE APPELLEES HAVE THE BURDEN OF ESTABLISHING THAT APPELLANT'S DISABILITY (which it is agreed exists) DID NOT RESULT FROM PERFORMANCE OF DUTY, WHICH THEY HAVE FAILED TO DO.

Appellant here did not seek to be retired from the Police Force and is not the moving party. He was "directed" to appear.

The important case of Blohm v. Tobriner, 122 U.S. App. D.C. 2, July 16, 1965, rehearing denied, reads, in part:

> "Where it is the Police Department which initiates the proceeding to retire an officer against his will for a disability which is alleged to be unrelated to his official service, the evidence of such lack of connection should clearly preponderate and be substantial and persuasive. Absent a record of which this can be said the Department may be said to have failed to carry the burden, fairly to be assigned to it under the statute." (Emphasis supplied)

In Footnote #2, the Court stated, in part:

> "The Department had the burden of showing affirmatively that appellant's headaches were not the result of his earlier accident. When its own evidence, in substance, merely demonstrates the difficulty of establishing the contrary, we cannot say that the burden has been met. (Emphasis supplied)

Falling far short of the requirement of the Blohm case, it is urged that there was no medical testimony before the Retirement Board which would indicate that appellant's disability arose from other than performance of duty, particularly in the face of the positive testimony that, in substance, the disability was connected with the performance of duty.

In recognition of the Blohm case the District Court has held that the usual presumption in favor of sustaining findings of administrative bodies is not to be indulged in a case where a District of Columbia policeman is retired for disability not incurred in line of duty. Monica v. Tobriner, D.C., (1966), 253 F. Supp. 851.

CONCLUSION

On the basis of the foregoing authorities, including the Blohm case which places a substantial burden on the Commissioners, which has not been borne here, and the degree against resolving "doubts" against officers in retirement cases, and the liberal attitude of this Court toward retirement cases generally, as shown by the Hyde case which requires that the "evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action", and upon the "humane purpose of the retirement laws" as referred to in the Crawford case, the case should be reversed and appellant ordered retired for disability incurred in the performance of, or aggravated by duty.

Respectfully submitted,

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CONTENTS TO JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BALLARD G. HENSLEY
7301 Geneva Lane
Camp Springs, Maryland
Plaintiff

vs. Civil Action No. 2517-'63

WALTER N. TOBRINER
JOHN B. DUNCAN
CHARLES M. DUKE
Board of District of Columbia
Commissioners
District Building
14th and K Streets, N. W.
Washington, D. C.
Defendants

RELEVANT DOCKET ENTRIES

1963

October 14 - Complaint.

November 12 - Answer of defts to complaint, filed.

1967

May 5 - Motion of pltf for summary judgment; affidavit with exhibits A, B, C, D-1, D-2, E-1 thru E-6, F, G-1, G-2, H, H-1, H-2, H-3, I, I-1, J, J-1, J-2, K-1 thru K-4, L, M-1, M-2, N, O, P, filed.

July 31 - Motion of defts for summary judgment; exhibits 1 & 2 filed.

November 2 - Order denying pltf's motion for summary judgment and granting defts' motion for summary judgment. Sirica, J.

November 9 - Notice of appeal by pltff from order of 11-2167, filed.

[Filed Oct. 14, 1963]

COMPLAINT FOR MANDATORY INJUNCTION DIRECTING RETIREMENT OF FIREMAN FOR DISABILITY INCURRED WHILE PERFORMING DUTY AND DIRECTING REVERSAL OF THE ORDER RETIRING FIREMAN FOR DISABILITY NOT INCURRED IN PERFORMANCE OF DUTY

1. Jurisdiction. The jurisdiction of this Court is based upon and invoked under Tilte 11, Section 306 of the D. C. Code (1961 Ed.) and under its general power and equitable jurisdiction in that this suit involves action on the part of the defendants in violation of the rights of the plaintiff which has, and if not enjoined, will continue to cause him irreparable and incalculable damage.

2. Plaintiff. Plaintiff, born July 21, 1912, is a citizen of the United States and a resident of the State of Maryland and was a member of the Fire Department, District of Columbia, from October 24, 1945, until the date of his retirement for disability on and after July 31, 1962, which he contends was improper and illegal.

3. Defendants. The defendants, Walter N. Tobriner, John B. Duncan, and Charles M. Duke, are all members of the Board of Commissioners of the District of Columbia, and as such, among other things, supervise and control the aforementioned Fire Department of the District of Columbia.

4. Plaintiff Incurred Disability in the Line of Duty. Plaintiff served as a member of the District of Columbia Fire Department during the period mentioned above and sustained no injuries of a serious nature outside of his duty as a fireman. On February 9, 1961, while on duty as a fireman and after he had been shoveling snow and chipping ice near the fire house for an extended period of time, plaintiff suffered severe chest pain for which he was treated

and hospitalized under the supervision of the Police and Fire Clinic physicians who were under the supervision and control of the defendants, and plaintiff was also examined at their insistence by many physicians called for consultation. He was thereafter returned to duty but suffered another attack while on duty and later fainted and fell onto a chair while on duty. Some of the aforementioned physicians rendered the opinion that the plaintiff was suffering from a mild coronary condition and chest discomfort of a musculo-skeletal origin and anxiety (which was attributable to service in the Fire Department). The defendants expended public funds for the aforementioned medical care and hospitalization and granted the plaintiff excessive sick leave for the aforementioned conditions, all of which would be improper unless plaintiff's condition was, in fact, attributable to his duty, and thus defendants' recognized that said conditions were attributable to his duty. Thereafter, plaintiff was recommended by the physicians of the Police & Fire Clinic for a disability retirement.

5. Action of the Retirement and Relief Board. As a result of plaintiff's aforementioned disability which was incurred in the line of duty, he appeared before the Police & Firemens Retirement and Relief Board for retirement on August 10, 1961, and on other dates which, if granted on the basis of disability incurred in the line of duty, would have resulted in plaintiff having been retired on the basis of 66-2/3% of his base pay at retirement, the proceeds of which would not be subject to federal or state income tax. At the various hearings before the retirement board testimony was offered which, along with the previous recognition by the defendants of his disability incurred in the line of duty, or in the absence of same, clearly indicated that plaintiff's disability was incurred in the line

of duty. There was no other competent evidence presented to the retirement board to establish the plaintiff's aforementioned disability was not incurred in the performance of his duty as a fireman. Said Retirement Board, nevertheless, on July 26, 1962, made a finding which stated in part as follows:

> "ORDERED, that Ballard G. Hensley, a Private in the Fire Department of the District of Columbia, having been found physically incapacitated for further duty in said department by reason of disability not incurred in the performance of duty as a fireman, is hereby retired effective from and after July 31, 1962."

As a result of the aforementioned finding of the Retirement Board plaintiff would retire on the basis of 40% of his base pay at the time of retirement, the proceeds of which are subject to federal and state income taxes.

6. Plaintiff's Appeal Rejected by Commissioners. Thereafter, the plaintiff appealed the aforementioned order of the retirement board to the defendants contending in substance, among other things, that the action of the Board was arbitrary and not supported by the evidence, and that there was nothing in the record of the proceedings before the said retirement board which would support a finding that plaintiff's disability was incurred other than in the performance of his duties. Thereafter, and in the absence of any additional material and evidence which would indicate that plaintiff's disability was not incurred in the line of duty, the defendants, by letter dated August 6, 1963, to plaintiff's counsel, advised that on August 6, 1963, the Commissioners, after having reviewed the records and testimony in the case, voted unanimously to sustain the action of the Police and Firemen's Retirement and Relief Board retiring Private Hensley for disability not incurred in the line of duty.

7. Plaintiff's Irreparable Injury. As a result of the defendants' action as aforesaid, the plaintiff has been retired for disability not incurred in the line of duty, as a result of which he receives, in effect, instead of the amount mentioned above, only 40% of his base pay at the time of retirement based on his service as a fireman, which will be subject to income taxes within a few years, and plaintiff has been irreparably injured thereby. Plaintiff has done all that is required by law in order to receive the retirement annuity allocated to firemen who are retired due to disability incurred in the performance of duty, but, nevertheless, the said annuity to which he is entitled has been denied him and he will continue to suffer this loss throughout the remaining years of his life and plaintiff has no other source of relief from defendants' action except by way of appeal to a Court of equity.

8. Defendants' Action Arbitrary. The defendants' action in sustaining the decision of the Retirement Board is completely arbitrary, unsupported by the evidence before the Board and before the defendants, and completely disregards the competent medical testimony offered in the case.

WHEREFORE, plaintiff prays:

1. That the Court issue a Mandatory Injunction directing the defendants to reverse their aforementioned order dated August 6, 1963, directing the defendants to reverse the order of the Police and Firemen's Retirement and Relief Board ordering plaintiff retired for disability not incurred in line of duty, and directing the defendants to order plaintiff retired for disability incurred during the performance of duty, effective as of July 31, 1962, and further directing the defendants to pay to plaintiff the difference between what he has been paid since July 31, 1962, and what he should have

been paid if his retirement had been correctly designated, under Title 4, Section 527 of the District of Columbia Code, at the rate of 66-2/3% of his base pay as of July 31, 1962, said money to be paid to plaintiff in a lump sum.

2. That the Court grant such other and further relief as the nature of the case may require.

/s/ Ballard G. Hensley

[Jurat]

[Filed Nov. 12, 1962]

ANSWER OF DEFENDANTS TO COMPLAINT FOR MANDATORY INJUNCTION

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. The defendants say that the allegations contained in paragraph numbered 1 of the complaint contain conclusions of law and conclusions of the pleader which defendants are not required to answer.

2. In answer to the allegations contained in paragraph numbered 2 of the complaint the defendants deny that their action in sustaining the Police and Firemen's Retirement and Relief Board's decision to retire the plaintiff for a disability not incurred in the performance of Fire Department duties was improper or illegal. Defendants admit the remaining allegations contained in said paragraph.

3. The defendants admit the allegations contained in paragraph numbered 3 of the complaint.

4. In answer to the allegations contained in paragraph numbered 4 of the complaint, defendants deny that the plaintiff incurred his disability in line of duty as alleged in the first sentence of said paragraph; are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence. Concerning the remaining portion of said paragraph, defendants say that the plaintiff was hospitalized on or after February 9, 1961; that he was retired for a disability not incurred in the performance of duty on or about September 1, 1961; that on or about March 20, 1962, the Board of Commissioners ordered that the plaintiff be restored to duty in a non-violent position; that subsequent to the plaintiff's restoration to duty on April 1, 1962, the Board of Police and Fire Surgeons recommended that he be referred to the Police and Firemen's Retirement and Relief Board; that as a result, that Board retired the plaintiff for a disability not incurred in the performance of duty effective July 31, 1962, and that the defendants affirmed the action of the aforesaid Retirement Board. Defendants say that the remaining allegations contained in said paragraph contain conclusions of law and conclusions of the pleader which the defendants are not required to answer. However, if answer be required, the same are denied.

5. In answer to the allegations contained in paragraph numbered 5 of the complaint, defendants deny that the plaintiff's disability was incurred in the performance of duty; deny that the evidence clearly indicated that the plaintiff's disability was incurred in the line of duty; deny that "There was no other competent evidence presented to the Retirement Board to establish plaintiff's aforementioned dis-

ability was not incurred in the performance of his duty as a fireman", admit that the plaintiff was retired on July 6, 1962 for a disability not incurred in the performance of duty which retirement became effective from and after July 31, 1962. Defendants say that the remaining allegations contain conclusions of law and conclusions of the pleader which the defendants are not required to answer. However, if answer be required, the same are denied.

6. In answer to the allegations contained in paragraph numbered 6 of the complaint, the defendants say that the plaintiff appealed the decision of the aforesaid Retirement Board to the defendants, that on or about August 6, 1963, the defendants voted unanimously to sustain the action of the aforesaid Retirement Board retiring the plaintiff for a disability not incurred in the performance of duty. Defendants say that the remaining allegations in said paragraph contain conclusions of law and conclusions of the pleader which defendants are not required to answer. However, if answer be required, the same are denied.

7. The defendants say that the plaintiff was retired for a disability not incurred in the performance of duty and deny all allegations or inferences that the action of the defendants in affirming the Retirement Board's order was illegal, arbitrary or unsupported by the evidence. The remaining allegations in said paragraph contain conclusions of law and conclusions of the pleader which defendants are not required to answer. However, if answer be required, the same are denied.

8. The defendants deny the allegations contained in paragraph numbered 8 of the complaint.

Further answering the complaint; defendants deny all allegations of unlawful action attributed to them in the complaint and all

other allegations not specifically admitted or otherwise answered. Further, defendants deny all allegations of arbitrary or unreasonable action or conduct alleged in the complaint.

Third Defense

The defendants say that their action in affirming the retirement of the plaintiff for a disability not incurred in the performance of duty is supported by substantial evidence.

/s/ Chester H. Gray
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel, D. C.

/s/ William F. Patten
Assistant Corporation Counsel, D. C.

Attorneys for Defendants
District Building
Washington, D. C. 20004

[Certificate of Service]

[Filed July 31, 1967]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Plaintiff moves the Court to enter Summary Judgment in his favor on the ground that consideration of the pleadings and other matter, exhibits, etc., on file, demonstrate that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law.

MARGOLIUS, DECKELBAUM, GREENSPOON & EDWARDS

By Carleton U. Edwards, II

Stanley M. Karlin

[Certificate of Service]

[Filed May 5, 1967]

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

1. (Plaintiff's Appointment to District of Columbia Fire Department) Plaintiff, Ballard G. Hensley, was born July 21, 1912, and was appointed to the District of Columbia Fire Department on October 24, 1945, at which time he was found to be fully qualified both physically and otherwise for said appointment.

2. (Plaintiff a Member of District of Columbia Fire Department for Seventeen Years) - Plaintiff is a citizen of the United States, a resident of the State of Maryland, and was a member of the District of Columbia Fire Department for almost seventeen (17) years until

his retirement for disability not incurred or aggravated in the line of duty on and after August 1, 1962.

3. (Plaintiff Suffered Attacks of Chest Pains While on Duty) - The occasions that Plaintiff suffered attacks of chest pains while on duty are itemized in Exhibits B and K-1.

4. (Plaintiff Became Disabled for Duty) - There is no question but that Plaintiff became disabled for duty, for otherwise he would not have been brought before the Retirement Board.

5. (Plaintiff was Involuntarily Ordered Before the Retirement Board on Two Occasions) - Plaintiff was ordered to appear before the Board of Police and Fire Surgeons and before the Retirement Board for consideration of his retirement on two occasions, neither of which were at his request. (See Exhibits H-1, H-3, J-1 and L)

6. (There Was No Evidence Before The Retirement Board on Either Occasion that Plaintiff's Heart Condition Was Not Incurred or Aggravated in The Line of Duty) - See transcripts of hearings before the Retirement Board. (Exhibits N and O)

7. (The Retirement Board, at Plaintiff's First Hearing, Ordered Plaintiff Retired for Disability Not Incurred or Aggravated in The Performance of Duty)

8. (The Board of Commissioners Rescinded The Retirement Order and Returned Plaintiff to Duty) - The Board of Commissioners found that Plaintiff should not have been retired, rescinded the retirement order, and ordered Plaintiff restored to limited non-violent duty. (See Exhibit 1)

9. (The Retirement Board, at Plaintiff's Second Retirement Hearing, by a Split Three-Two Decision, Ordered Plaintiff Retired for Disability Not Incurred or Aggravated in the Performance Duty) - See Exhibit P which states, in part, "We, the undersigned,

feel that this member of the Fire Department should be retired for disability incurred in the performance of duty," and is signed by the Fire Marshal, Fire Department, District of Columbia, and Deputy Chief, Metropolitan Police Department.

10. (Defendants Recognized that Plaintiff's Illness and Disability were Incurred in Line of Duty by Approving Excess Sick Leave) - Exhibit F and M-1 show that the Board of Surgeons, Fire Chief and the defendant Commissioners approved sick leave, including one hundred sixty eight (168) hours excess sick leave in the year 1962, for "Organic Heart Disease," which would be improper in the absence of such condition having been incurred or aggravated in the line of duty.

11. (Defendants Recognized that Plaintiff's Illness and Disability Were Incurred in Line of Duty by Paying for Plaintiff's Hospitalization and "Outside" Medical Treatment) - Exhibits D-1, D-2 and E-1 through E-6 show that the Plaintiff, on several occasions in 1961 and 1962, was hospitalized and examined by "outside" doctors because of his heart condition, and the bills for such treatment and services were paid by the defendants, which payments would be improper in the absence of such condition having been incurred or aggravated in the line of duty.

Carleton U. Edwards, II

Stanley M. Karlin

Attorneys for Plaintiff

[Certificate of Service]

[Filed May 5, 1967]

AFFIDAVIT OF STANLEY M. KARLIN

DISTRICT OF COLUMBIA, ss:

STANLEY M. KARLIN, being first duly sworn, deposes and says as follows:

1. I am one of the attorneys for the above-named Plaintiff, Ballard G. Hensley, and have knowledge of the matters hereinafter referred to and make this Affidavit in support of Plaintiff's Motion for Summary Judgment.

2. Certain documents are attached hereto as Exhibits, and all of them were either received from the District of Columbia Government or their representatives by Plaintiff's counsel and/or appear as part of said Plaintiff's official personnel file maintained by the District of Columbia. These exhibits, which are deemed pertinent to the said Motion for Summary Judgment, are as follows:

Exhibit A (September 24, 1945) - A Board of Police and Fire Surgeons Medical Survey on Plaintiff, dated September 24, 1945, at the time of his original appointment, indicating that everything is "O.K."

Exhibit B - Report of injury to member of District of Columbia Fire Department stating facts regarding plaintiff's chest pain attack while shoveling snow.

Exhibit C - Letter from Fire Department Lieutenant John P. Breen concerning Plaintiff's chest pain attack while shoveling snow.

Exhibit D-1 & 2 - District of Columbia Fire Department vouchers for payment of "outside" medical expenses incurred by Plaintiff.

Exhibit E-1 through E-6 - District of Columbia Fire Department forms for the authorization of payment, by the District of Columbia, of "outside" medical expenses incurred by Plaintiff.

Exhibit F - District of Columbia Fire Department report of excess sick leave approving a total of fifty four (54) days excess sick leave from April 1961 through August 1961 for "(1) Pain Anterior Chest Wall, (2) Left Angina, cause undetermined," approved by the Chairman of the Board of Surgeons, the Fire Chief and the Commission sitting as a Board.

Exhibit G-1 & 2 - Fire Department's "Record of Physical Disability" on Plaintiff.

Exhibit H - A Board of Police and Fire Surgeons memorandum to the Fire Chief, dated July 31, 1961, requesting that Plaintiff be directed to appear before the Board of Police and Fire Surgeons.

Exhibit H-1 - A Board of Police and Fire Surgeons Medical Survey report on Plaintiff recommending that Plaintiff appear before the Retiring and Relief Board for consideration of retirement and indicating among other diagnoses "Heart-Angina."

Exhibit H-2 - A letter from Victor H. Esch, M.D., a member of the Board of Police and Fire Surgeons, to the Board of Police and Fire Surgeons, dated July 31, 1961, summarizing the care and treatment given to Plaintiff and stating in part "it is requested that he appear before the Retirement and Relief Board for consideration of retirement."

Exhibit H-3 - A letter from the Fire Chief to the Plaintiff, dated August 2, 1961, directing Plaintiff to appear before the Police and Firemen's Retirement and Relief Board on August 10, 1961.

Exhibit I - A letter from the Secretary of the Board of Commissioners stating in part, "that the action of the Police and Firemen's

Retirement and Relief Board in retiring said Ballard G. Hensley is rescinded effective from and after August 31, 1961, that said Pvt. Ballard G. Hensley is restored to duty effective on that date."

Exhibit I-1 - District of Columbia Fire Department form containing Plaintiff's service record.

Exhibit 4 - Memorandum from the Fire Chief to the Chairman of the Board of Police and Fire Surgeons, dated March 22, 1962, advising him that Plaintiff had been directed to report to the Board of Police and Fire Surgeons.

Exhibit J-1 - A Board of Police and Fire Surgeons Medical Survey Report on Plaintiff, dated March 27, 1962, recommending that Plaintiff be referred to the Retirement and Relief Board for consideration.

Exhibit J-2 - A Memorandum to the Fire Chief from John A. Reed, M.D., Chairman, Board of Police and Fire Surgeons, dated April 5, 1962, and stating in part, "the Board at this time recommends that Private Hensley again be referred to the Retirement and Relief Board for further consideration."

Exhibit K-1 - Report of injury to member of District of Columbia Fire Department stating facts regarding Plaintiff's fainting spell on April 20, 1962, while performing routine office work.

Exhibits K-2 through K-4 - Letters from three District of Columbia Firemen to the Fire Chief concerning the observations of Plaintiff's fainting spell on April 20, 1962.

Exhibit L - A Board of Police and Fire Surgeons Medical Survey Report on Plaintiff, dated May 22, 1962, recommending that Plaintiff be referred to the Retiring and Relief Board for consideration and indicating, among other diagnoses, "Heart - 104 Angina."

Exhibit M-1 - District of Columbia Fire Department report of excess sick leave approving one hundred sixty eight hours (168) excess sick leave for June 1962 for "Organic Heart Disease", approved by the Chairman of the Board of Surgeons, the Fire Chief and the Commissioners sitting as a Board.

Exhibit M-2 - A memorandum to Commissioner Tobriner from Milton D. Korman, Acting Corporation Counsel, District of Columbia, concerning excess sick leave given to Plaintiff during July 1962.

Exhibit N -A transcript of a hearing before the Police and Firemen's Retirement and Relief Board relative to Plaintiff's retirement held on June 14, 1962.

Exhibit O - A transcript of a hearing before the Police and Firemen's Retirement and Relief Board relative to Plaintiff's retirement held on July 24, 1962.

Exhibit P - A Memorandum of the Police and Firemen's Retirement and Relief Board, dated July 26, 1962, indicating that three of the Board's members had voted for Plaintiff's retirement for disability not incurred or aggravated by the performance of duty and that two members had voted that he should be retired for "disability incurred in the performance of duty."

Stanley M. Karlin

[Jurat]

[Certificate of Service]

[Filed July 31, 1967]

MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT

The defendants move the Court for summary judgment in their favor on the grounds that the complaint together with Plaintiff's Exhibits A through P and Defendants' Exhibits 1 and 2 attached hereto and by reference made a part hereof, demonstrate that there is no genuine issue as to any material fact and that they are, therefore, entitled to judgment as a matter of law.

/s/ Charles T. Duncan
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation
Counsel, D.C.

/s/ Robert M. Werdig, Jr.,
Assistant Corporation
Counsel D.C.

Attorneys for Defendants

[Certificate of Service]

[Filed November 2, 1967]

ORDER

Upon consideration of the complaint, of the motions of plaintiff and defendants for summary judgment, of the points and authorities filed in support thereof and in opposition thereto and after oral argument in open court, it is, by the Court, this 2nd day of November, 1967,

ORDERED: That plaintiff's motion for summary judgment be, and the same is, hereby denied, and it is,

FURTHER ORDERED: That defendants' motion for summary judgment be, and the same is, hereby granted.

/s/ John J. Sirica
Judge

[Filed November 9, 1967]

NOTICE OF APPEAL

Notice is hereby given this 9th day of November, 1967, that plaintiff, Ballard G. Hensley hereby appeals to the United States Court of Appeals for the District of Columbia from the Judgment of this Court entered on the 2nd day of November, 1967 in favor of defendants, Walter N. Tobriner, et al against said plaintiff, Ballard G. Hensley.

/s/ Carleton U. Edwards, II
Attorney for Plaintiff

[THE REMAINDER OF THE JOINT APPENDIX [pp. 19-123] IS CONTAINED IN THREE FOLDERS FILED SEPARATELY IN ACCORDANCE WITH ORDER OF THE COURT.]

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,506

BALLARD G. HENSLEY,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellees,
District Building,
Washington, D. C. 20004

STATEMENT OF QUESTION PRESENTED

Whether there is in the administrative record substantial evidence to support, and a rational basis for, appellees' finding that appellant's disability was not incurred in the performance of duty as a fireman.

I N D E X

Page

SUBJECT INDEX

CASES CITED

UNITED STATES CODE CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

OTHER AUTHORITIES CITED

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* Cases and authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,506

BALLARD G. HENSLEY,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

In a complaint for mandatory injunction filed in the court below, appellant, a former member of the District of Columbia Fire Department, sought to compel appellees to set aside their order retiring him for diability incurred other than in the performance of duty and to retire him for disability allegedly incurred in the performance of duty (J. A. 1). Cross-motions for summary judgment were subsequently filed by appellant and appellees (J. A. 9, 16). Upon consideration of

the cross-motions, the court below, on October 18, 1967, denied appellant's motion for summary judgment and entered summary judgment in appellees' favor (J. A. 16, 17). The court's ruling was based upon evidence in the administrative record, essentially as follows:

Appellant was appointed to the District of Columbia Fire Department on September 24, 1945, and thereafter performed various duty assignments (J. A. 34, 82). On February 9, 1961, appellant experienced chest pain while clearing ice and snow from the driveway in front of an engine house. He was hospitalized at Casualty Hospital for approximately ten days, subjected to clinical tests, and examined by Dr. Bernard J. Walsh and Dr. Frank Talbot, both cardiologists. Electrocardiograph studies and other tests showed no evidence of heart disease. (J. A. 38, 40, 70, 90.)

In the course of the examination, appellant told Dr. Walsh of two other hospitalizations during the previous 9-year period (J. A. 40; cf. J. A. 45, 48, 78). These hospitalizations resulted from similar chest pains which were considered to be "non cardiac with the pain probably arising in the chest wall." The physician noted that "in the interval between hospitalizations * * * [appellant had] been at full activity without special distress of any kind." In his report to the Board of Police and Fire Surgeons, Dr. Walsh stated that the "chest

pain of February 9th, 1961, must be assumed to be local muscle strain or irritation in the chest wall, probably related to * * * [appellant's] snow shoveling of that day." Dr. Walsh told appellant that "he could be discharged and could resume duty in his accustomed manner." (J. A. 40.) The conclusion of Dr. Talbot "after a prolonged hospitalization and frequent examinations * * * was that * * * [appellant] had no heart disease" (J. A. 41).

Following his return to duty, appellant consulted Dr. Jack P. Segal. In subsequent letters to Dr. Esch of the Board of Police and Fire Surgeons, Dr. Segal noted that, since leaving the hospital, appellant complained to him of "left precordial discomfort related to anxiety and exertion." Appellant told Dr. Segal that he was unable to perform the severe type of exertion required in his position. Although Dr. Segal's examinations disclosed no physical evidence of heart disease, he reported that appellant's "history is suspicious enough to warrant the diagnosis of angina pectoris." He felt that appellant "probably does have mild coronary disease, but that most of his chest discomfort is musculoskeletal in origin." In Dr. Segal's opinion, appellant was capable of performing activities requiring mild to moderate exertion and, for an occupational standpoint, could be kept on limited duty. (J. A. 39, 41, 42.)

Thereafter, appellant again complained of "chest pain which started one evening, apparently after an argument with his wife that morning" (J. A. 38). He was admitted to the Washington Hospital Center, where he was examined by Dr. William A. Bailey of the Police and Fire Clinic, and by Dr. John A. Reisinger. All "diagnostic studies and clinical evaluations were essentially normal," and appellant was discharged. (J. A. 38, 68, 107.)

In a letter dated July 31, 1961, Dr. Victor H. Esch, of the Board of Police and Fire Surgeons, referred to all previous studies and examinations of appellant by physicians and noted that these physicians could find no objective evidence of heart disease. Dr. Esch pointed out, however, that appellant had made continuing complaints of "fatigue, malaise, headache and generalized chest discomfort" and expressed the view that, for this reason, it would not "be possible to rehabilitate * * * [appellant] to return to active duty." It was the recommendation of the Board of Police and Fire Surgeons that appellant appear before the Retirement and Relief Board for consideration of retirement. (J. A. 35, 36.)

On August 10, 1961, the Police and Firemen's Retirement and Relief Board conducted a hearing at which Dr. Esch testified concerning the physical examinations following appellant's complaints of chest pain and read into the record the pertinent physicians' reports. (J. A. 38-42).

Appellant then testified concerning the chest pains experienced while shoveling snow in front of an engine house, as well as previous chest pain and dizziness resulting in other examinations and observations (J. A. 45, 46).

Following the hearing, the Retirement Board concluded that appellant was physically incapacitated due to a disability not incurred in the performance of duty. An appeal was taken to the District of Columbia Board of Commissioners which, upon review of the case, found that appellant should not have been retired and, on March 20, 1962, ordered appellant restored to duty (J. A. 52).

Before returning to duty, appellant was routinely directed to report to the Board of Police and Fire Surgeons on March 27, 1962, for a physical examination (J. A. 54). Appellant was examined and the Board reviewed his entire case including the data previously submitted to the Retirement and Relief Board by Dr. Esch. On April 5, 1962, the Board of Surgeons recommended that appellant "again be referred to the Retirement and Relief Board for further consideration" (J. A. 57). In the meantime, appellant returned to light duty on April 1, 1962 (J. A. 53).

On April 20, 1962, "while performing routine office work at his assigned desk, * * * [appellant] appeared to faint and fall from [a]

chair" (J. A. 74). Appellant was transported to the Washington Hospital Center. He remained at the Hospital Center for eight days and was examined by Dr. W. Howard Yeager on April 25, 1962. Appellant told the physician that while working he developed a dizzy spell and experienced chest pain. Dr. Yeager was unable to determine what caused the incident, and extensive tests disclosed no evidence of a disabled heart condition. The tests did reveal evidence of gout, and it was for this condition that appellant was mainly treated while at the Hospital Center. (J. A. 74, 115, 116.)

On June 14, 1962, appellant again appeared before the Retirement and Relief Board. At the hearing which followed, Dr. Bailey testified that, in the opinion of the Board of Police and Fire Surgeons, appellant's condition had not changed since the Board's previous retirement recommendation on July 31, 1961 (J. A. 67). He made reference to his own examination of appellant, to the examinations of Drs. Walsh, Talbot, and Segal, and also to the examination of Dr. John A. Reisinger, who is co-chief of cardiologists at the Washington Hospital Center (J. A. 67-70, 107). Dr. Bailey noted that, with the exception of Dr. Segal, these physicians were of the view that there was no cardiac disease present (J. A. 68, 107, 108). He pointed out that Dr. Segal could find no "physical evidence of heart disease" (J. A. 68).

Appellant testified concerning the activities which he performed in connection with his various duty assignments throughout the years and of his outside employment as an ambulance attandant at Casualty Hospital (J. A. 87-88). He told the Board that he believed that he was now incapable of performing duty (J. A. 78, 79, 92, 94). Appellant then called Captain John Breen and Captain Alvin E. Davis of the Fire Department, who also testified as to the duty assignments performed by appellant and as to their associations with appellant throughout the years (J. A. 96, 104). Captain Breen, who was the officer in charge when appellant was assigned to shovel snow in front of the engine house on February 9, 1961, testified as to appellant's manifestations of pain which preceded his hospitalization on this occasion (J. A. 97).

Near the conclusion of the hearing, counsel for appellant noted appellant's history, his complaints of chest pain, and his examinations by physicians, together with their findings disclosing no objective evidence of heart disease. Expressing his belief that "there * * * [was no] coronary situation," counsel raised the possibility of appellant's having a psychiatric disorder. Counsel then recommended that appellant be examined by a psychiatrist. The Board accepted this recommendation and the hearing was adjourned. (J. A. 110, 111.)

The proceedings before the Retirement Board resumed on July 24, 1962, and a report from Dr. Hyman D. Shapiro, a psychiatrist, was read into evidence. In the opinion of Dr. Shapiro, appellant had no psychiatric disorder. (J. A. 114, 115.)

Dr. William H. Yeager, an internist who examined appellant following his hospitalization in April 1962, then testified that appellant has coronary artery disease manifested mainly by angina. He recognized that extensive tests showed no evidence of such a disease, stating that his diagnosis was based on appellant's symptoms. (J. A. 115, 116.) Counsel for appellant asked Dr. Yeager if he had an "opinion as to whether * * * [appellant's] condition is the result of his performance of duty as a fireman," and the physician stated that "it is hard to say whether this is the result of duty as a fireman or is the normal aging process" (J. A. 117).

On July 26, 1962, the Retirement and Relief Board concluded that appellant should be retired for a disability not incurred in the performance of duty and entered an appropriate order (J. A. 121). An appeal was taken to the District of Columbia Board of Commissioners which, on August 6, 1963, affirmed the action of the Retirement and Relief Board (J. A. 3, 7).

SUMMARY OF ARGUMENT

The administrative record is completely devoid of probative evidence that appellant has a disability incurred in the performance of duty as a fireman. On the contrary, the composite of all negative factual data of record is substantial evidence of the absence of any such disability. There is, accordingly, a rational basis for appellees' decision that appellant's disability is not service connected.

Since appellant conceded his disability and sought retirement at the higher pension rate, the holding in Blohm v. Tobriner, 122 U. S. App. D. C. 2, 350 F. 2d 785 (1965), respecting the burden of proof is inapplicable here.

ARGUMENT

Because there was substantial evidence to support, and a rational basis for, the administrative determination that appellant's disability was not incurred in the performance of duty, the court below correctly refused to substitute its judgment for that of appellees.

Appellant was retired for a disability not incurred in the performance of his duties as a fireman under § 4-526, D. C. Code, 1967. He urges that he should have been retired for a heart disability incurred in the performance of duty under § 4-527(1), D. C. Code, 1967. Es-

sentially, appellant contends (1) that the administrative record contains uncontradicted evidence that he has a heart disability incurred in the performance of duty (brief, pp. 16-18); and (2) that, in any event, under the doctrine of Blohm v. Tobriner, 122 U. S. App. D. C. 2, 350 F. 2d 785 (1965), appellees did not carry their burden of establishing a disability not incurred in the performance of duty (brief, p. 19).

The administrative record discloses that on several occasions, over a period of approximately eleven years, appellant complained of chest pains occurring both on and off duty. As a result, he was hospitalized for brief intervals, examined by physicians, and subjected to extensive clinical tests. The resulting findings effectively negate the existence of a heart disability incurred in the performance of duty, if indeed a heart disability was incurred by appellant at any time. Thus, when appellant was hospitalized following chest-pain complaints emanating from the snow shoveling incident of February 1961, he was examined by Dr. Bernard J. Walsh, one of the District's leading heart specialists. Dr. Walsh's report noted that appellant had been hospitalized on two other occasions during the preceding nine-year period as a result of complaints of similar chest pains. The physician noted that there was an interval of approximately eight years between the previous two hospitalizations and also observed that, during this interval, appel-

lant had been at "full activity" as a fireman (J. A. 40). In the opinion of Dr. Walsh, the pain arising from the snow shoveling incident was in no manner related to any heart disability, and he concluded that appellant was physically capable of resuming duty "in his accustomed manner" (J. A. 40). Dr. Frank Talbot, another heart specialist who also examined appellant, was of a similar belief (J. A. 41).

Appellant's fourth complaint of chest pains and resulting hospitalization may be logically traced to an off-duty incident involving an argument with his wife. Again, the examinations of two physicians, together with clinical tests, disclosed no evidence of heart disease. The fifth and final hospitalization followed appellant's complaints of dizziness and chest pains while performing routine office work. As in the past, no objective evidence of a disabled heart condition could be found by the examining physician. On this occasion, appellant was treated "mainly for gout."

Both the Retirement and Relief Board and counsel for appellant had the benefit of this factual background,[1] and it was just such a back-

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[1]And it is not without significance that the Board of Police and Fire Surgeons, in its report to the Retirement and Relief Board, noted that there was no evidence of heart disease. On the contrary, the reason for the Board's recommendation that appellant be considered for disability retirement was his continuing complaints of "fatigue, malaise, headache and generalized chest discomfort." (J. A. 35, 36.)

ground that prompted appellant's counsel to express his belief that "there * * * [was no] coronary situation" and to recommend that appellant be examined by a psychiatrist with a view to ascertaining whether he had a mental disability (J. A. 111). The resulting psychiatric examination, however, disclosed no such disability and the Board was so advised (J. A. 114, 115). The Board then heard the testimony of Dr. William H. Yeager, an internist who examined appellant on the occasion of his fifth and final hospitalization.

Although appellant places great reliance on Dr. Yeager's opinion (brief, pp. 7, 8), his testimony falls far short of establishing a heart disability incurred in the performance of duty. In this connection, the physician, while recognizing that there was no physical evidence of a heart disability (J. A. 116), stated that appellant's symptoms prompted him to conclude that appellant has coronary artery disease manifested mainly by angina. Certainly, however, the cause of the asserted heart condition, rather than its manifestations, was the crucial issue before the Retirement and Relief Board. Thus, the administrative record discloses the following questioning of Dr. Yeager by counsel for appellant:

> Q. * * * [C]an you form or do you have an opinion as to whether or not this man's condition is the result of his performance of duty as a fireman?

A. That is a difficult question. It is hard to say whether this is the result of duty as a fireman or is the normal aging process. (J. A. 117.)

In short, the testimony of Dr. Yeager, together with the other pertinent facts of record, previously discussed, flies in the face of appellant's contention that there is uncontroverted evidence of a disability connected with the performance of duty. A consideration of the whole of the administrative record will lead to the conclusion that "the composite of all the negative factual data is substantial evidence of the absence of any connection." See Wheatley v. Adler, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 20,455, decided October 2, 1967, slip opinion, p. 4).

It is no answer to say that appellees had the burden of proof, and appellant's reliance on Blohm v. Tobriner, supra, in this regard is clearly misplaced. The principal distinction between Blohm and the instant case is that, there, the policeman involved, in the language of the Court, "made clear that he was resisting forced retirement" (122 U. S. App. D. C. at 3). Appellant, on the other hand, insisted that he was incapable of performing duty and made it clear that he was seeking retirement (J. A. 78, 79, 92, 94). Moreover, the disability

involved in Blohm was characterized as "service-connected" by a Department physician whom the Department "later decided not to call as a witness or even mention to the Retirement Board or to the Commissioners" (122 U. S. App. D. C. at 4). Such a circumstance is plainly absent in the case at hand. In addition, Blohm involved a recent duty-connected injury (the officer was thrown from his motorcycle) of a clearly discernible nature. The case, in contradistinction, presents five complaints of chest pains and dizziness extenting over an eleven-year period. These complaints arose both on and off duty, and gave rise to many clinical tests, none of which disclosed any discernible evidence of a heart disability.

Taylor v. Tobriner, 120 U. S. App. D. C. 316, 346 F. 2d 797 (1965), is of greater significance in evaluating appellant's burden of proof contention, because that case more closely parallels the case at hand. In Taylor, as here, and unlike in Blohm, supra, no attempt was made to force retirement on an unwilling individual. There, as here, retirement at the higher pension rate was sought because of an asserted heart disability. The administrative record, however, contained no evidence as to the cause of the claimed disability. While the burden of proof issue was not discussed by the Court in Taylor, the issue was squarely presented to the Court in the briefs of counsel.

Against such a background, the Court, of necessity, had to conclude that appellees do not have the burden of proof in a case such as the instant one where special circumstances, such as those present in Blohm, do not appear in the administrative record.[2]

While it is true that, in Taylor, the only manifestation of a defective heart condition occurred while the officer was off duty, the time and place of the manifestation cannot be considered controlling as far as the cause of the underlying disability is concerned. This is clear from the testimony of Dr. Yeager, upon which appellant places such great reliance (J. A. 117). See also McNiece, Heart Disease and the

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[2] The action by the Board of Police and Fire Surgeons in granting excessive sick leave to appellant cannot be equated with a binding determination that appellant has a disability incurred in the performance of duty (cf. brief for appellant, pp. 14, 15). This action obviously was not based on the entire administrative record, and could not preclude the Retirement and Relief Board from making a finding of a disability not connected with duty, based upon the entire administrative record. A contrary result would permit the Board of Police and Fire Surgeons to unlawfully usurp the regulatory functions of the Retirement and Relief Board and appellees. See § 4-533, D. C. Code, 1967, supra, and Reorganization Order No. 31, D. C. Code, 1967, Title 1, Administrative Appendix, p. 118. At most, the effect of granting appellant excessive sick leave was to give him the benefit of the doubt until such time as the Retirement and Relief Board and appellees could review all pertinent facts and make a final determination as to the cause of his disability. Certainly, this humane action cannot now be utilized as a basis for erecting an estoppel against appellees. No decision of this Court has held otherwise.

Law (1961), Chapter 11, p. 57; Timmons v. McGaughey, 193 Kan. 171, 392 P. 2d 835 (1964); Heusmann v. Priest, 366 S. W. 2d 42 (Mo. App., 1963). And it cannot be said that heart disease is an occupational disease of firemen absent legislation so providing. See McNiece, Heart Disease and the Law (1961), Chapter 9, pp. 44-51, especially p. 50. There is, of course, no such legislation in the District of Columbia.

If anything, there is even greater justification for the order of appellees providing for compensation at the lower pension rate in the instant case than there was in Taylor. In Taylor, there was at least undisputed medical evidence that a disabling heart condition existed; whereas here, according to all clinical tests and a decided majority of medical opinion, there was "no cardiac disease present" (J. A. 108).

Moreover, one will search the Police and Firemen's Retirement and Relief Act in vain to find a provision placing the burden of proof on appellees. See § 4-533, D. C. Code, 1967. In the absence of such a provision, the applicable rule is that:

> "* * * [T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal. This is usually the claimant, complainant, or applicant * * *." (2 Am. Jur. 2d, Administrative Law, § 391, p. 197; footnotes omitted; emphasis added.)

See also Judge Burger's dissenting opinion in Hyde v. Tobriner, 117 U. S. App. D. C. 311 at 313, 329 F. 2d 879 at 881 (1964); Philadelphia Co. v. Securities and Exchange Commission, 84 U. S. App. D. C. 73, 175 F. 2d 808 (1948); and see Board of Firemen's Relief & Retirement Fund Trustees v. Marks, 150 Tex. 433, 242 S. W. 2d 181, 27 A. L. R. 2d 965 (1951), a case involving a statute similar to that here involved.

Appellees do not claim that the stricter evidentiary principles applicable to judicial proceedings apply in proceedings before the Retirement and Relief Board. Nonetheless, appellant was seeking retirement at the higher pension rate, which could not be justifiably authorized unless there was a showing by substantial evidence that his disability was service connected. In this sense, and in the absence of a statutory presumption that his disability was service connected, appellant had the "burden of proof." Thus, in Pacific Gas & Electric Co. v. Securities & Exchange Commission, 127 F. 2d 378 (9th Cir., 1942), the Court said, at p. 382:

> "The words 'burden of proof' are used in two senses: (1) the duty to prove a charge by a degree of proof such as a preponderance of the evidence; and (2) the duty to go forward with the evidence. Department of Water and Power v. Anderson, 9 Cir., 95 F. 2d 577, 582, 583. In the first sense, 'burden of proof' has no application to an administrative proceeding such as this. The statute does

not specify any degree of proof required for any particular finding. The statute in question permits an application to be granted without hearing, but requires 'notice and opportunity for hearing' if the application is denied or otherwise disposed of.

"The statute does not even specify the party who shall have the duty of opening and closing the hearing. If such a hearing is held it is only common-sense which requires the company to present its evidence, since it seeks a particular declaration. When the evidence is all in, the Commission considers the whole body of evidence, both pro and con, and finds what the ultimate facts are, unrestrained by any rule regarding burden of proof, as used in the first sense. The sole restraining rule is that the fact found must be supported by substantial evidence, as is provided in § 24(a) of the act, and if such fact is so supported, it is conclusive, whether it is supported by what someone other than the Commission thinks is a preponderance of the evidence or not.

"Since the company is, by the terms of the act, a 'subsidiary' company and can be relieved of that status only by an order of the Commission, and since such an order may be made only when the Commission finds three facts, in a broad sense, it is natural to say that the company has the 'burden of proof'. However, when those words are used, neither of the technical senses, mentioned above, is intended. What is meant is that the company must present substantial evidence which convinces the Commission as to the three facts mentioned. * * * " [Emphasis added.]

The Pacific Gas & Electric Company case, as it relates to the above-quoted principles, was cited with approval by the Court in American Gas & Electric Co. v. Securities & Exchange Commission, 77 U. S. App. D. C. 174, 182, 134 F. 2d 633, 641 (1943), and appellees submit that logic compels the application of such principles in the instant case.

The practical effect of appellant's contention is that the Retirement Act presents a rebuttable presumption that a retiree's disability is connected with duty. The most cursory glance at the statute reveals, however, that Congress created no presumption of any kind in the retiree's favor, and Congress is not unfamiliar with the subject of presumptions in compensation statutes. In this connection, it is significant that the statute in question is quite unlike the Longshoremen's and Harbor Workers' Compensation Act, where Congress used apt language to create a presumption in the employee's favor. See 33 U. S. C. § 920. In the absence of such a presumption in the instant case, the conclusion that appellees could not justify appellant's retirement at the higher pension rate is inescapable.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the administrative record is totally devoid of probative evidence upon which appellees could justify appellant's retirement at the higher pension rate. Accordingly, the judgment of the court below was, in all respects, correct and should, therefore, be affirmed.

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REPLY BRIEF FOR APPELLANT

IN THE

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Appellant,

v.

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Appellees.

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OTHER AUTHORITIES

1. **An Examination of the Pertinent Chronology Clearly Demonstrates That the Failure of Dr. Walsh (Who Examined Appellant Only Once) and of Dr. Talbot (Who Examined Appellant Only Twice) (All in February, 1961) To Diagnose a Heart Condition at That Time, Was Rendered Ineffective and Superseded by Appellant's Subsequent Attacks and Symptoms, and the Later Diagnoses of a Heart Condition by Other Physicians, Who Thereafter Examined Him, Some Almost One and One-Half Years Later.** Appellees in their brief, rely heavily on the fact that Drs. Walsh and Talbot made no diagnosis of heart disease. It is important to note that Dr. Walsh examined appellant *only once,* namely on February 18, 1961 (JA 22) (JA 40 indicates that it was on February 19, 1961), and Dr. Talbot examined him *only twice* (2/9/61, 2/20/61, JA 22, 51).

Officer Hensley experienced a number of other attacks and symptoms over a long period of time thereafter, long after the examinations by Drs. Walsh and Talbot, during which time he was examined by other physicians including Drs. Segal, Esch, and Yeager, who *did* diagnose a heart condition.

A review of the pertinent chronology demonstrates that the fact that Drs. Walsh and Talbot did not diagnose a heart condition in February, 1961, even if correct, was rendered ineffective and superseded by the later diagnosis of heart disease by the other physicians, particularly at the time of the Board hearing on July 24, 1962, approximately one and one-half years later.

The pertinent chronology is as follows:

2-9-61	Snow shoveling chest pains—(incident # 1) hospitalized at Casualty until 2-20-61—Examined by Drs. Walsh (JA 39) and Talbot (JA 41) and Dr. Esch (JA 32)—tests normal.

3-12-61	After return to duty, again put on sick leave—sick leave for "strain chest wall," "angina" etc.—between February—August, 1961 total of 84 days, 54 being excess (JA 30)
3-23-61	Examined by Dr. Segal (JA 41)
4-4-61	Examined by Dr. Segal (JA 41)
4/20-27/61	Hospitalized Washington Hospital Center (JA 23) Bill $355.50.
?	Second chest pains (incident # 2)
5/21-29/61	Hospitalized Washington Hospital Center. Bill $371.40 (JA 22)
6-2-61	Dr. Segal examines for *third* time concluding "probably does have mild coronary disease." (JA 39)
7-31-61	Dr. Esch's letter to Board of Surgeons "under my care since February 9, 1961. . . continued to complain of fatigue, malaise, headache and generalized chest discomfort. . .Diagnosis is pain, anterior chest wall, left, angina, cause undertermined. . .not felt possible to rehabilitate. . .requested that he appear before Retirement. . .Board for consideration of retirement. (*Recommendation # 1*) (JA 35, 36)
8-1-61 (?)	Board of Surgeons find "Heart—Angina". Recommend that this man appear before Retirement Board for consideration for Retirement. (*Recommendation # 2*). (JA 34)
8-10-61	Retirement Board Hearing # 1—Appellant ordered retired for disability not incurred in line of duty, as of 8-31-61 (JA 52)

Important excerpts from the first Retirement Board Hearing, 8/10/61, (JA 38-51) are as follows: (JA 38) Dr. Esch. . .Hensley under his care since February 9, 1961. . .Casualty Hospital. . .chest pain . . .clearing ice and snow from driveway. . .consultation Drs. Talbot and Walsh. . .discharged, returned to duty. . .however since that time has continued to complain of fatigue, malaise, headaches and generalized chest discomfort. . .tests negative for organic heart disease. . . later examined by Dr. Segal. . .recently hospitalized Washington Hospital Center with chest pain. . .started one evening after argument with wife that morning. . .Dr. Esch's diagnosis "pain, anterior chest wall left, angina, cause undetermined". . . discharged from hospital returned to duty. . .continued to complain extreme fatigue, malaise, and vague chest discomfort. . .placed on sick leave each occasion. . . not felt possible to rehabilitate. . .request of appearance before Retirement Board for consideration for retirement.

Dr. Jack Segal's first report (JA 41). . .examined Hensley March 23, 1961, and again on April 4, . . .history of Casualty admission after shoveling snow for approximately 7 hours. . .substernal and precordial discomfort and radiation to left arm. . .continued pain since leaving hospital. . .described as stabbing and pressure sensation lasting 1/2 hour radiating to left arm. . .fatigue, shortness of breath, some flushing, episodes of dizziness. . .returned to work for a few weeks on March 12, 1961 but again on sick leave because of above symptoms. . .prescription for nitroglycerine which relieved discomfort in 5-10 minutes (JA 42).

Dr. Segal examined again April 4, 1961. . .believe Hensley *possibly does have arteriosclerotic heart disease with mild angina pectoris* (JA 42). . .continued to use nitroglycerine when necessary. . . believe that he can perform activities requiring mild exertion but should avoid activities requiring excessive strenuous exertion (JA 42).

Dr. Segal's second report (JA 39). . .saw Hensley June 2, 1961 . . .continued different types of chest discomfort. . .intermittent left upper anterior chest. . .sharp stabbing left precordial pain which usually last a few minutes after taking nitroglycerine tablet. . .recently admitted to Washington Hospital Center with chest pain, one evening after argument with wife that morning. . .I feel *Hensley does have mild coronary disease*. . .most chest discomfort is musculoskeletal in origin. (JA 39)

Dr. Walsh's letter of 2/22/61 (JA 39-40). . .examined officer at Casualty 2/19/61. . .found him free of pulmonary abnormalities. . . his chest pain of February 9, 1961 must be assumed to be local muscle strain or irritation in the chest wall and *probably related to his snow shoveling* that day.

Dr. Talbot (JA 41) saw Hensley 1/19/61 at Casualty. . .concluded "That Mr. Hensley. . .had no heart disease."

Officer Hensley testified he had not injured himself during off duty employment. . .injured quite a few times in Fire Department (JA 44). . .no accidents or diseases while in military service. . .incident of February 9, 1961 first such attack ever (JA 46). . .a difference between pain 9 years previously and that in 1961. . ."I am tired and whipped all the time now so if anybody can straighten me out I would be tickled to death. *I would rather go back and fight fire any day*" (JA 51).

9/1/61	Retirement Board order that officer be retired for disability not incurred in the line of duty (JA 66), and officer appealed.
3/20/62	Commissioners rescind retirement, and order fireman restored to duty (JA 52) (limited non-violent duty status) (JA 53)

3/22/62	*Directed* to report to Surgeons for physical examination, for "record purposes." (JA 54)
3/27/62	Board of Surgeons medical survey "recommend Pvt. Hensley be referred to Retirement Board. . .for consideration (Recommendation # 3) (JA 55)
3/30/62	Dr. Reed's (Chairman Board of Surgeons), letter to fire chief disclaims responsibility "for anything medical happening to him in the future." (JA 56)
4/1/62	Returned to duty (JA 75)—Chest pains "off and on."
4/5/62	Dr. Reed, for the Board of Surgeons again recommends "Pvt. Hensley be referred to Retirement Board for further consideration" (JA 57). (Recommendation # 4)
4/20/62	(Incident # 3) While at work Hensley "appeared to faint and fall from chair" (JA 58) Again hospitalized Washington Hospital Center, "patient is still hospitalized because of abnormal laboratory reports which seem to indicate cardiopulmonary pathology." Signed W. Howard Yaeger, Jr., 4-25-62" (JA 58, 74), "found Pvt. Hensley lying on the floor, in a shaking condition trying to put a pill in his mouth. . .oxygen was administered" (JA 59). "Pvt. Hensley was rather clammy and a little purple in the face. . .making an attempt to take one of his nitroglycerine pills due to a pain that he had incurred." (JA 61)
5/22/62	Board of Surgeons Medical survey—"heart—angina" "recommend. . .Retirement. . .Board for consideration." (Recommendation # 4) (JA 62)
April-June 1962	Sick leave April (56 hours), May 184 hours, June 168 hours, all for "*organic heart disease*" (JA 63) which

was approved by the chairman of the Board of Surgeons Fire Chief, and the "commissioners sitting as a board on July 31, 1962."

6/14/62 Second Retirement Board Hearing (JA 64-112) important excerpts—Man taking six different drugs apparently prescribed by Dr. Yaeger (JA 77). . .the 1960 chest pains were diagnosed as "acute gastritis" (JA 78). . .officer answered about 5,000 fire calls (JA 84) . . .estimated he'd gone into 3,000 fires without a gas mask (before there were enough of them for every fireman) (JA 85). . .has become sick at stomach from smoke inhalation (JA 89). . .Capt. Breen described him as "among the top firemen" (JA 98). . .Capt. Davis stated "I would say without exaggeration he was one of the best wagon drivers I ever had. He was a sincere hard worker, honest, performed his duties and I would say he was probably one of the hardest workers in the company (JA 104-106). . ."Well, that is one thing that I think I can very definitely (say) that never in the ten years that I was with him that I would ever had any question of ever feigned any type of illness or that he ever complained too much. In fact, I would say that I have questioned him at times for probably *over-exposing himself.*" (JA 106) (all emphasis supplied)

Dr. Bailey concurs in opinions of Board of Surgeons. . . .Angina "means pain in the chest wall" (JA 109). Psychiatric exam considered (JA 112)

7/24/62 Following are the pertinent portions from Transcript of Retirement Board Hearing # 3, 7/24/62 (JA 113-120): Dr. H. D. Shapiro (psychiatrist) reported "this

man does not present any definite clinical psychiatric disability" (JA 114) Dr. William H. Yaeger, Jr., a member of the Board of . . .Surgeons stated (JA 115) "I feel that *this patient has coronary-artery disease manifested mainly by angina.* His symptoms are relieved by nitroglycerine. His electro(cardio)grams have not changed on any of these *heart attacks* which he has had. . .while he was hospitalized in April. . . 1962. At that time he had returned to work and while working he developed a dizzy spell, chest pain, precordial chest pain with radiation to his left shoulder, and then he fainted, or passed out, falling off a chair suffering an abrasion of his back, and, what happened this time I can't definitely say. . .When I saw him at the hospital. . .the only positive finding was he had abrasion to his back in the cervical region. . . The only abnormal tests were his L.B.A. which is lactic dehydrogenase. This can be elevated in myocardial infarction, can be elevated in a pulmonary infarction. . .These tests were elevated one day and normal the next. (JA 115) . . . (At JA 116) "On these findings, I would say with the chest pain, the radiation of the pain, the aggravation by activity, the *relief with nitroglycerine,* I would say *it is coronary artery disease* even *though the cardiograms do not show it.* (JA 116). . .I would say there is an *angina.* . .If he was all right before he started shoveling snow and shoveling snow brought on the pain, then I *would say the shoveling of the snow was the cause of the angina* . . .(JA 117). . .coronary insufficiency is not enough blood getting into the heart, if this man does a lot of exertion, he will have insufficiency which would

bring on the pain. The exertion can bring it on or the aging process. As we get older our arteries get smaller. . .(JA 118) In response to the question "And there is nothing in this man's record, is there Doctor, to indicate that he did have coronary insufficiency prior to his incident in shoveling the snow" he stated "As far as I know, there is not." (JA 118)

7/26/62 Retirement Board split 3-2 vote for retirement for disability not incurred in the performance of duty, the Fire Marshal and Deputy Police Chief voting that the officer should be retired for disability incurred in the performance of duty. (JA 121) Thereafter on 8/6/63 the Commissioners affirmed the above order.

It is urged, on the basis of the foregoing chronology, that it is quite clear, that Officer Hensley's heart condition was incurred in the performance of duty, and the initial reports of Drs. Walsh and Talbot lost their significance with the passage of time.

2. **Hensley's February 9, 1961 Chest Pain Referred to in Appellees' Brief Developed After He Had Been Shoveling Snow and Chipping Ice Almost Continuously for 6-7 Hours and Was the First Chest Pain of This Kind He Had Ever Experienced**—Appellant's February 9, 1961 chest pain referred to in appellees' brief p. 2, developed after he had been shoveling snow and chipping ice almost continuously for *6-7 hours* (JA 40, 41) Capt. John Breen, Hensley's commanding officer at the time, testified at the second Retirement Board Hearing on June 14, 1962 (JA 97, 98), that after he had first advised Hensley to notify him through the dispatcher if he continued to feel badly, he found Hensley lying over his desk, conscious, but "not feeling very good," and the color of his face was a blue-gray complexion, and that "he appeared to be definitely sick." Appellant testified at the first Retirement Board Hearing (JA 45) that this was the

first pain of this kind that he had ever experienced. It is exceedingly doubtful that had this chest pain been merely musculoskeletal that it would produce the blueish-gray coloring described by Capt. Breen. (See also JA 21), and be relieved by nitroglycerine (JA 42, 115, 116)

3. **The Fact That the Clinical Tests Were Negative for Organic Heart Disease Was Not Conclusive That the Appellant Was Not Suffering From a Heart Condition**—Appellees state at page 2 of their brief, that, "Electrocardiograph studies and other tests showed no evidence of disease. (JA 38, 40, 70, 90)" JA 38 does not fully corroborate this statement as it states, "All chest x-rays, electrocardiograph studies, and medical evaluations have been negative for *organic* heart disease." The blueish-gray coloring described by Capt. Breen, mentioned above, would seem to be significant. The facts that the clinical tests were negative did not conclusively indicate that Officer Hensley was not suffering from a heart condition because people have been known to die of heart conditions shortly after having had a normal EKG, etc.

4. **No Doctor Testified That the Argument With His Wife Caused Appellant's Second Attack of Chest Pains**—Appellees imply in their brief at page 4 that an argument with his wife was responsible for appellant's second attack of chest pains citing JA 38. While the record does not state the exact date, this incident obviously occurred some time *after* Dr. Segal's first report (JA 41) which indicates that he had seen the appellant on March 23 and April 4, 1961 in his office, and some time *before* June 2, 1961, as Dr. Segal's report dated June 19, 1961 (JA 39) which states, ". . . .he was recently admitted to Washington Hospital Center with chest pains which started one evening apparently after an argument with his wife that morning." He was hospitalized at Washington Hospital Center twice between April 14 and June 2, 1961, the first time being between 4-20-62 and 4-27-62 (JA 23) indicated that the bill includes emergency room on

4-20-62 and also between 5-21-62 through 5-29-62 (JA 22). Despite appellees implication that the argument with his wife caused these chest pains, no doctor testified to this effect, and this could easily have been a mere coincidence.

5. **The Fact That Appellant Resumed Full Activity After the Occurrence of Pains Prior To February 9, 1961 Indicated That It Was Not Heart Trouble**—On page 2 of their brief, appellees quote from Dr. Walsh's report indicating that "In the interval between hospitalizations. . . . (Appellant had been at full activity without special distress of any kind)" This indicates that the earlier heart conditions preceding that of February 9, 1961 were probably not heart trouble.

6. **It Was Conceded That Appellant Was Disabled, Which Was Due To Heart Disease or Some Other Condition**—Most of the tests particularly the early ones failed to reveal evidence of organic heart disease. Appellees brief page 6 states Dr. Segal could find no "physical evidence of heart disease." It is submitted that many people have heart disease where no physical evidence can be demonstrated and many people have been known to suffer an attack and die of heart trouble shortly after a normal EKG.

In this respect see McNiece, "*Heart Disease and the Law*" page 18 where it is stated:

> "The courts which unduly stress prior apparent good health as evidence of lack of cardiac disease are, of course, not the only ones which exhibit a lack of awareness of modern medical knowledge. Other courts for example, seem to rely unduly upon recent insurance examinations, company physical examinations, and cardiograms to establish the existence of prior good health. *In many such cases there appears to be a failure to appreciate that an advanced cardiac condition may go undetected in a medical examination*

or that a cardiogram may not reveal the fact that a person has had a recent myocardial infarction."

In any event, whether appellant's disability was heart trouble or some other condition he *was disabled* and this was conceded. Appellees are asked where is the medical evidence that appellant's disability was not attributable to his duty?" The answer, there was none.

7. **The Invalid Withdrawal, by Appellees' Reorganization Orders 31 and 47 in June, 1962, of the Board of Surgeons' Function of Expressing Medical Opinions in Retirement Cases, Which Had Been Given to the Board of Surgeons by Congress, Should Be Considered Favorably to Appellant**—Appellees' Brief p. 9, asserts that the record is "devoid of probative evidence that appellant has a disability incurred in the performance of duty as a fireman." While this is incorrect, it is submitted that one of the reasons why Dr. Yaeger, testifying at the third Retirement Board Hearing on July 24, 1962 (JA 113-120) did not render a more definite opinion as to the causal connection between appellant's heart condition, which he diagnosed, and appellant's performance of duty, may have been because of Appellees' Reorganization Orders 31 (referred to in Appellees' brief at p. 11, footnote 1), and 47, which became effective June 21, 1962, and which purported to *withdraw* from the Board of Surgeons the function of expressing a judgment as to the disability of a member (which as shown by D.C. Code 4-521(2) and 4-529, were delegated directly to the Board of Surgeons by Congress), and to redelegate this function to the Retirement Board. The pertinent portions of these orders, which are found in D.C. Code, 1967 Edition, Title 1, Administration, Appendix, at p. 118, and 129 respectively read as follows:

REORGANIZATION ORDER NO. 31.—POLICE AND FIREMEN'S RETIREMENT AND RELIEF BOARD

Reorganization Ord. No. 31, C.O. 274,993, C O. 302,853/14, C.O. 302,970.C, P.D. 01.9542, Apr. 30, 1953, as amended July 20, 1954, June 28, 1955, Sept. 5, 1957, Nov. 2? 1960, and June 21, 1962, ordered that: *****

PART IX

The Police and Firemen's Retirement and Relief Board established herein is hereby designated, as agent of the Commissioners, to make all findings of fact necessary in the determination of eligibility for retirement and survivor annuities pursuant to Public Law 85–157 [See §§ 4–521 to 4–535, Chap. 5, D.C. Code], 85th Congress, as approved August 21, 1957, and to take final action in such cases subject to provisions for review set forth in Reorganization Order No. 31, as amended.

In making such findings of fact the Board shall consider the written opinion submitted to it by the Board of Police and Fire Surgeons concerning the physical or mental condition, or both, of the member for whom involuntary separation or retirement is sought, together with all records and testimony of the Board of Police and Fire Surgeons relating to such member, and such records and testimony of any other person bearing on the matter before the Police and Firemen's Retirement and Relief Board.

The authority set forth in subsection "(i)" of the Policemen and Firemen's Retirement and Disability Act (P.L. 85–157; § 4–529, D.C. Code, 1961 ed. [now 1967 ed.]) to express a judgment as to the disability of a member from performing further duty in his department is hereby delegated exclusively to the Police and Firemen's Retirement and Relief Board.

REORGANIZATION ORDER NO. 47.—BOARD OF POLICE AND FIRE SURGEONS

Reorganization Ord. No. 47, L.S. 4237–B, June 26, 1953, as amended Oct. 16, 1958, and June 21, 1962, ordered that:

PART I

Board of Police and Fire Surgeons.—A. The existing Board of Police and Fire Surgeons including the Office of the Chairman thereof, is hereby reconstituted, with the same name and with the same functions now performed, including the powers, duties, and authorities of all members, officers, and employees assigned thereto: *Provided*, That in all cases involving retirement or involuntary separation from service pursuant to the Policemen and Firemen's Retirement and Disability Act (P.L. 85–157; §§ 4–526 through 4–529, D.C. Code, 1961 ed. [now 1967 ed.] (subsection (f), Retirement for Disability Not Incurred in Line of Duty; subsection (g), Retirement for Disability Incurred While Performing Duty; subsection (h), Optional Retirement; and subsection (i), Involuntary Separation)), the duty of the Board of Police and Fire Surgeons shall be limited to that of submitting in writing to the Police and Firemen's Retirement and Relief Board its opinion concerning the physical or mental condition, or both, of the member for whom involuntary separation or retirement is sought, but any member of the Board of Police and Fire Surgeons, and any other person, whose report of the facts or examination of the member formed any part of the basis of such opinion of the Board of Police and Fire Surgeons shall, when so requested by any member of the Police and Firemen's Retirement and Relief Board, testify thereon before the Retirement and Relief Board with respect thereto and produce before such Board all the records and evidence before, or in the files of, the Board of Police and Fire Surgeons or any such other person concerning the member whose retirement or separation is sought, and such submission and all such records and evidence of the Board of Police and Fire Surgeons and of any such other person shall be considered by the Police and Firemen's Retirement and Relief Board: *Provided further*, That under the authority vested in the Commissioners by Reorganization Plan No. 5 of 1952, as confirmed by the second sentence of subsection "(q)" of the Policemen and Firemen's Retirement and Disability Act, the authority lodged in the Board of Police and Fire Surgeons by subsection "(i)" of said Act and by virtue of Reorganization Order No. 47 prior to this amendment, to express a judgment as to the disability of a member from performing further duty in his department, is hereby withdrawn from said Board of Police and Fire Surgeons, and such authority is hereby delegated exclusively to the Police and Firemen's Retirement and Relief Board, established pursuant to Reorganization Order No. 31, as amended.

*****

The roots of these Reorganization Orders are believed to have sprung from retirement cases where members of the Board of Surgeons, who had examined and treated officers over a period of time, and then testified before the Retirement Board giving opinions of service connected disability and, in the absence of contradictory testimony, were ignored by the Retirement Board, which then rendered findings unfavorable to the officer who then appealed, and succeeded in reversing the Retirement Board on the ground the evidence warranted or required a more favorable finding.

Thus, the case of *Souder v. Tobriner, et al.*, 114 U.S.App.D.C. 267, 314 F.2d 272 (1963), while handed down after the said Reorganization Orders became effective, was based on testimony given in 1961 prior to the effective date of said Reorganization Orders. In that case Dr. Hyman Shapiro's report stated in part (at 114 U.S.App. D.C. 268): "It is further my opinion that his disability is the direct result of the performance of Police duties and has disabled him 100%." Dr. Shapiro also testified to the same effect therein at p. 268-269. By a 3-2 vote the Retirement Board ordered the officer retired for disability not incurred in the performance of duty. This Court reversed, stating (at 114 U.S.App.D.C. 269) "There being no contrary evidence, the record considered as a whole gives no basis for, nor does it warrant, the determination of the Commissioners that the disability was not incurred in line of duty."

That these reorganization orders accomplished the desired effect upon the Board of Surgeons is shown in page 17-19 of a transcript of a Retirement Board Hearing held on June 27, 1963, which is contained in the records of the case of *Roberts v. Tobriner, et al.*, which is presently pending in this Court as # 21790 wherein this same Dr. Shapiro was asked a question as a *causal connection* by the officer's attorney, and he at first declined to answer citing the "Commissioner's order", (i.e. # 31, and 47).

A lengthy discussion ensued participated in by Lyman Umstead, Esq., the Assistant Corporation Counsel member of the Board, who stated he was "unhappy this has taken the turn" and confirmed the effect of the said Reorganization Orders and cited the *Souder* case (at p. 19 of the transcript). The medical member of the Board (Dr. Billet) insisted on an answer from Dr. Shapiro, who testified (at p. 19):

> "May I add something to this? Up until a year ago when we wrote up our recommendations to the Board, we would conclude whether the disability was or was not in line of duty or was aggravated. Based on this Commissioners' [Reorganization Orders] we are prevented. This question was raised last month and I wanted to be sure before I answered the question put to me by Mr. Wood." (the officer's attorney).

It is urged that these Reorganization Orders are *invalid* as an attempt by the appellees to amend the provisions of an Act of Congress. Had Congress not spoken on the subject as to the function of the Board of Surgeons, then appellees might well have had the power to promulgate such orders, but certainly Congress did not empower the appellees to amend the statute. Over and above that the wisdom of such orders is in question, which, in effect, prevent the physician board member who has in most cases, had the officer under his care and treatment for a long period of time and examined him many times, and the most logical person to give an opinion from giving an opinion. If such a rule were applicable in civil negligence cases, a plaintiff, in most cases, would be unable to establish through his medical expert, a causal relationship between the accident and the plaintiff's diagnosed condition.

The effect of this "gag" should be considered by this Court favorably for the appellant (i.e. the absence of an opinion by the

Board of Surgeons member of causal connection between performance of duty and the diagnosed disabling condition, should not be regarded unfavorably against the appellant under the circumstances). It is further urged that in the absence of a medical opinion that the officer's condition was *not* incurred or aggravated by duty that appellees have not borne the burden assigned to them under the *Blohm* case.

8. **Causation in Heart Cases Usually Is Concerned With Aggravation Not Etiology and There Is a Difference Between Medical and Legal Causation, Which Is Pertinent Here**—Appellees' Brief page 9 asserts that the record is "devoid of probative evidence that the appellant has a disability incurred in the performance of duty as a fireman."

That causation in heart cases is usually concerned with aggravation, acceleration, or "lighting up" and not in the etiological sense is pointed out by Dean (and Professor of Law) Harold F. McNiece, in "Heart Disease and the Law," cited by appellees pp. 11-12 wherein it is stated:

3 Differences Between the Legal and the Medical Concept of Causation

The use of the term "causal connection" or "causality" in cardiac cases may be easily misinterpreted insofar as it may convey the thought that the courts are thinking in terms of etiology, more specifically, that work-connected incidents can cause a cardiac condition in a healthy workman. With few exceptions the courts do not labor under any such view. The inquiry of the courts is not into all the causative factors of the disease and the relative importance of each from the medical standpoint, but simply whether the work contributed, in the slightest, to the result. They are not particularly concerned with whether an incident at work can cause cardiac disease in an otherwise healthy person, and their decisions do not assume that this can happen.

Stated differently, the courts are not talking of causation in an etiological sense but rather of aggravation, acceleration or "lighting up." Unlike the medical profession, the courts are not concerned with the degree of impairment which may lurk beneath the surface appearances of a man. Their inquiry is not directed to the undoubted existence of the chronic and longstanding features of cardiac impairments, but rather to the fact that the work contributed, at least in some slight measure, to bring those impairments to light. With the possible exception of the situation where a claimant was in such bad health that disability or death was probable at any moment from the slightest exertion, the courts hold that full liability attaches even if the incident merely slightly accelerated the climax. Thus the cases almost invariably decide that the facts that the injury would not have resulted but for the pre-existing disease, or might just as well have been caused by a similar strain at home or at recreation, are both immaterial.

A decision upholding recovery of compensation benefits where the work contributed only in slight measure to the death or disability may seem unwarranted to those who are not familiar with the ancient tort concept of "taking the victim as you find him." Such persons may be impressed with the fact that, measured over the victim's life span, the amount of acceleration of death or disability produced by the work was inconsequential and with the further fact that, if the workman had not encountered the strain at work, he would probably have encountered a similar strain, with similar effects, at home or while engaged in recreation.

The courts, however, really do not deny any of these perfectly obvious propositions. What they are saying is that the social policy of the compensation acts, construed in the light of long-standing principles of legal causation, justifies the award of benefits in such cases. As the courts look at these cases, the employer cannot expect an employee to be in good health. Like the defendant who commits a negligent act, the employer must take the victim as he finds him and must assume responsibility for death or disability flowing in part from an incident at work even though the incident would not have resulted in death or disability had the victim been in good health. The fact that an individual had marked arteriosclerosis, syphilitic or rheumatic heart disease, or other form of cardiac disorder, predisposing him to a cardiac death or disability, is largely irrelevant as long as there is satisfactory medical evidence indicating that the man's employment contributed in some degree to the death or disability by accelerating its onset or aggravating its effects.

Further that there is a difference between *medical* and *legal* concepts of causation, and that generally the doctor thinks in terms of a single precise cause for a particular condition, while the law recognizes more than one cause for a particular injunous result see the case of *Tatman v. Provincial Homes,* 94 Ariz. 165, 382 P.2d 573, (Supreme Court of Arizona, 1963) which is digested in 31 *American Trial Lawyers Journal* 350, where it is stated in part, (at p. 352):

Medical vs. Legal Causation

The issue of causation has been a frequent medical-legal battlefield. Medical cause and legal cause do not have a common meeting ground. See Curphey, *Trauma and Tremours*, 1 J. Forensic Sci. 27–35 (Jan. 1956); Averbach, *Causation: Medico-Legal Battlefield*, 6 Clev.-Mar. L. Rev. 209 (1957). The doctor defines cause in terms of single and isolated bits of scientific exactitude. The lawyer views cause as a vehicle for adjusting losses in accordance with policy considerations which spring from our social and cultural milieu. See Small, *supra*, at 653.

A classical exposition of these discordant philosophies by way of two hypotheticals is to be found in Chief Justice Bernstein's opinion in *Tatman* wherein he stated: "Perhaps an illustration will help drive this ghost of Banquo from the table. Let us take a fifty-year-old man who has been walking all his life on the brink of a precipice. He has walked close to the brink but has kept his footing. Along comes someone who gives this man a push — not much of a push but just enough to make him lose his balance and plunge over the edge. It may not have been enough of a push to make a different person lose his balance. Medical cause would measure the force of the push and decide that the main reason for the plunge was that the man was too near the brink. For legal cause it is enough to show that but for the push the man could have kept on walking for even one more step. In the latter case the person who pushed the man must pay for all injuries resulting to him from his plunge. We give this one more general example: There once was a camel which carried loads across the desert for his master. Although no one knew it this camel had a weaker back than other camels, but as his

master had never loaded him too heavily he had been able to do his job well and was his master's favorite. At the beginning of one trip the camel was loaded as usual but while his master's back was turned a prankster wrongfully put a straw atop the load. The weight of this straw was just enough so that the camel's weak back collapsed. From the point of view of legal cause the prankster is liable to the camel's master for all damages the master suffers because of the camel's broken back." 382 P.2d 573, 575–576.

The relationship of trauma to cancer provides the most extreme setting for the conflict between medical and legal causation. In certain defense-oriented circles it is stubbornly insisted that scientific evidence rejects the view that a single trauma can produce a cancerous change. Russell and Clark, *Medico-Legal Considerations of Trauma and Other External Influences in Relationship to Cancer*, 6 Vand. L. Rev. 868 (1953). Yet, there are a multitude of cases in which cause has been inferred with reason from a logical sequence of events. See Note, 46 Corn. L. Q. 581 (1961) (collecting cases). See also the following recent cases: Celeste *v.* Progressive Silk Finishing Co., 178 A.2d 74 (N.J. Super. 1962) (back injury hastened death from cancer); Daly *v.* Bergstedt, 126 N.W.2d 242 (Minn. 1964) (a tort case holding that jury could find single trauma activating, precipitating cause of breast cancer); Fuller *v.* Pacific Intermountain Express Co. (Minn. Ind. Comm., March 10, 1964), 7 NACCA News L. 114 (May 1964) (trauma as activating, precipitating cause of knee cancer); Rohm & Haas, Inc. *v.* Stephenson, — S.W.2d — (Tenn. 1964), 7 NACCA News L. 115 (May 1964) (death following traumatic aggravation of pre-existing adenocarcinoma); In re Estate of Marsigli *v.* Granite City Auto Sales, Inc., 197 A.2d 799 (Vt. 1964) (slip and fall on ice aggravated carcinoma); *Sullivan's Case*, 186 N.E.2d 605 (Mass. 1962) (groin injury and subsequent herniorraphy accelerating pre-existing cancer).

Based on the foregoing principles it is obvious that Officer Hensley's original chest pain of February 9, 1961 was related to duty because Dr. Walsh stated in his report:

> "His chest pain of February 9, 1961 must be assumed to be local muscle strain or irritation in the chest wall probably related to his snow shoveling of that day" (JA 40)

It is also clear that appellant's later chest pains, etc., which developed while he was *on* duty fully satisfy the requirement of "legal" (as opposed to "medical") causation at least from the *aggravation* or *acceleration.*

9. **It Is Significant That at Least 12 States Have Statutes Providing that Heart Disease of Firemen, etc., Is an Occupational Disease**— Appellees urge in their Brief at p. 16 that ". . . . it cannot be said that heart disease is an occupational disease of firemen absent legislation so providing. Despite the absence of such a statute in this jurisdiction, it is significant that a number of states including California, Connecticut, Florida, Georgia, Maine, Massachusetts, Minnesota, North Dakota, Pennsylvania, Rhode Island, and Vermont, all have statutes relating to "heart trouble" "heart disease," etc., or some similar term relating to police and firemen, etc., wherein heart trouble is a regarded occupational disease and is "presumed to have been suffered in the line of duty unless the contrary is shown by competent evidence." For a digest of the statutes, *see McNiece,* supra, pp. 570-575.

10. **Appellees Erroneously Attempt To Shift the Burden To the Appellant in the Futile Effort To Overcome the Blohm Case**— The important case of *Blohm v. Tobriner,* 122 U.S.App.D.C. 2 (1965) rehearing denied, reads in part:

> "Where it is the police department which initiates the proceeding to retire an officer against his will for the disability which is alleged to be unrelated to his official service, *the evidence of such lack of connection should clearly preponderate and be substantial and*

> *persuasive.* Absent a record of which this can be said the Department may be said to have failed to carry the burden, fairly to be assigned to it under the statute." (Emphasis supplied).

In Footnote No. 2, the Court stated, in part:

> "*The Department had the burden* of showing affirmatively that appellant's headaches were not the result of his earlier accident. When its own evidence, in substance, merely demonstrates the difficulty of establishing the contrary, *we cannot say that the burden has been met.*" (Emphasis supplied).

Further, this Court stated (122 U.S.App.D.C. at 3) as follows with regard to "resolving doubts":

> "As appellant's history shows, policemen must of necessity engage in *hazardous work as part of their regular duties and Congress has amply manifested a distaste for the resolution of doubts against them in the administration of the laws passed for their protection.* See *Hyde v. Tobriner, supra,* Note 1." (And citing other cases) (Emphasis supplied).

The appellees futilely attempt to overcome these pronouncements in their brief at pp. 16-19 citing, among others, the case of *Pacific Gas and Electric Co. v. Securities and Exchange Commission,* 127 F.2d 378 (9th Cir. 1942), but they overlook or ignore the obvious fact that *police* and *firemen* retirement cases are not the "usual type of civil" case. This is undoubtedly because of the very hazardous nature of the work which these protectors of the public customarily engage in results in a *liberal* policy in their favor. The liberality of this Court toward retirement cases is demonstrated in the case of *Hyde v. Tobriner,* 117 U.S.App.D.C. 312, where it is stated in part as follows:

> "The *ambiguity* in this statement (referring to the doctor's statement that the officer's arthritis was either *caused* by or *aggravated* by his duties) *is resolved favorably to the appellant* because the Board of which this doctor was a member had previously certified that appellant's injury or disease, arthritis, was incurred in the performance of duty, adding that police officers are generally susceptible to this illness due to the nature of dampness, cold and strenuous nature of their duties. In evaluating the evidence consideration was given to the *humane purpose of such retirement laws. Accordingly, the evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action.* See *Crawford v. McLaughlin*. . . ."

Appellees on Page 17 of their Brief further attempt to place the burden on appellant where they contend "appellant was seeking retirement at the higher pension rate. . . ." Also at page 9 of their brief, appellees state, "Since appellant conceded his disability and sought retirement at the higher pension rate the holding in *Blohm v. Tobriner*. . .respecting the burden of proof is inapplicable here." As shown, appellant's brief, he *did not seek* retirement but was *ordered* before the Board of Surgeons and *directed* to appear before the Retirement Board. The fact that this is not voluntary is indicated in the case of *Monica v. Tobriner,* 253 F.Supp. 851 (1966).

The *Pacific Gas and Electric Co.* case, supra, cited by appellees involved an application to the Securities and Exchange Commission by the plaintiff company for an order that it was not a "subsidiary company" a holding company under a Federal statute, subjecting it to certain duties and obligations if it were a subsidiary. The statute provided in part that the Commission upon application shall order that a company is not a subsidiary company of a specified holding company if the Commission finds "that (i) the applicant is not controlled directly or indirectly by such holding company. . . ." etc.)

The Commission overruled the Trial Examiner's recommendation that the application be granted, finding that he had misconstrued the statute. The appellate court interpreted the statute "in a broad sense. . .to say that the company has the 'burden of proof' ", and further stating "What is meant is that the *company* (all emphasis supplied) must present substantial evidence which convinces the Commission as to the three facts mentioned" (127 F.2d 382). This decision was undoubtedly partially based upon the Congressional policy of protecting the public in securities matters and the *Blohm* case is likewise based upon the Congressional policy of liberal treatment for police and firemen in retirement cases, as the pertinent statute has been interpreted by this court.

Appellees also cite the case of *Philadelphia Co. v. Securities and Exchange Commission,* 84 U.S.App.D.C. 73, 175 F.2d 808 (1948) which case, however, actually supports appellant's, not appellees', contentions, in that it held in substance that the Commission erroneously failed to assume the burden in respect of the propriety of its proposed action. Likewise, in the instant case the "Department" (or appellees) are here erroneously attempting to shift the burden to the appellant.

In retirement cases, the moving party is the Department (or appellees) who undertake to prove that an officer's disability is *not* caused or aggravated by duty and failing to so prove, the officer must be retired at the higher pension rate. The appellees' burden of proving a negative is comparable in one respect to that of a plaintiff of proving a negative in a malicious prosecution case, who must prove among other things, defendant's "*want of* probable cause."

Respectfully submitted,

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